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ABSTRACT

Twelve papers presented during the Fourth Annual Earl Warren Memorial Symposium, which focused on the forces that shaped the pending Immigration Control and Reform Act of 1982 (known as the Simpson-Mazzoli Bill) are given. Included are "The Political Economy of Immigration" (Zolberg), "Of Borders and States: A Skeptical Note on the Legislative Control of Immigration" (Portes), "The Failure of United States Immigration Policy" (Keely), "From Select Commission to Simpson-Mazzoli: The Making of America's New Immigration Law" (Fuchs), "Employer Sanctions: Political Appeal, Administrative Dilemmas" (Garcia y Griego), and "Employer Sanctions Legislation in the United States: Implications for Immigration Policy" (Calavita). Other papers included are "Employer Sanctions Laws: The State Experience as Compared with Federal Proposals" (Schwarz), "Immigration Reform and Legal Rights: A Critical Analysis of the Simpson-Mazzoli Bill" (Strickland), "Legal Dilemmas in the Amnesty Provisions of the Simpson-Mazzoli Bill" (Heller and Olson), "Simpson-Mazzoli: Implications for the Latino Community" (del Olmo), "The Temporary Workers Provisions of the Simpson-Mazzoli Bill: Implications for the State of Florida" (McCoy), and "Simpson-Mazzoli vs. the Realities of Mexican Immigration" (Cornelius). Appended are edited comments of seven speakers, e.g., the Honorable William Wayne Justice (Chief Judge, United State District Court, Eastern District of Texas) who commented on educational implications and equal protection. (MH)

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AMERICA'S NEW IMMIGRATION LAW: ORIGINS, RATIONALES, AND POTENTIAL CONSEQUENCES

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AMERICA'S NEW IMMIGRATION LAW: ORIGINS, RATIONALES AND POTENTIAL CONSEQUENCES

edited by

WAYNE A. CORNELIUS

and

RICARDO ANZALDUA MONTOYA

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PREFACE

In November 1982, the Center for U.S.-Mexican Studies and Warren College of the University of California, San Diego cosponsored the Fourth Annual Earl Warren Memorial Symposium, an in-depth examination of several recent landmark events in the evolution of United States immigration policy. The conference focused on a review of the forces that shaped the Simpson-Mazzoli Immigration Reform and Control Act now before Congress, the first attempt in three decades to completely overhaul the nation's immigration law. This volume of essays and edited commentary summarizes the proceedings of the symposium and provides, at a pivotal moment in the legislative process, a much-needed critical analysis of the proposed statute.

As this volume goes to press, the U.S. Senate has just approved an amended version of the Simpson-Mazzoli Bill, and the House of Representatives is expected to act on the bill during the summer of 1983. However, even though most experts would agree that our nation needs to reform its immigration law and policies, many of the contributors to this anthology point out the serious difficulties that the bill faces — in terms of enforcement, effectiveness, and benefits — should it become law.

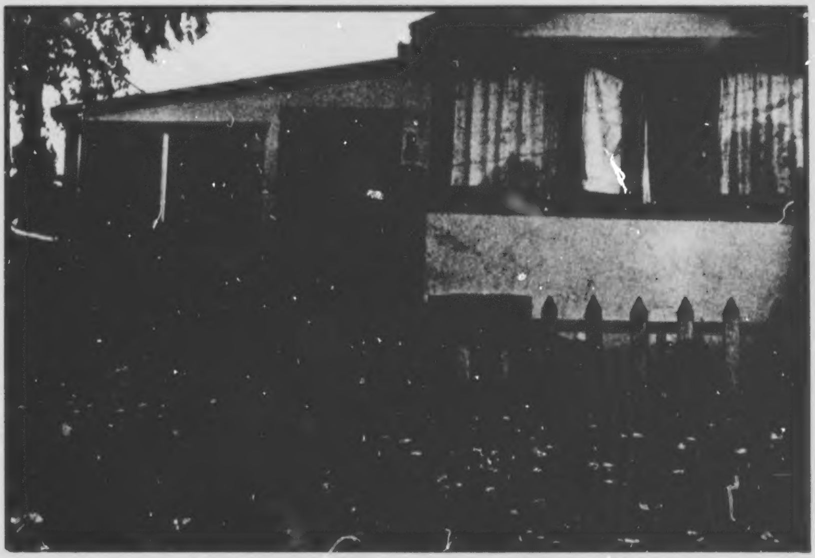
We are grateful to the eighteen distinguished jurists, attorneys, public officials, scholars, and journalists who participated as speakers in our symposium on "America's New Immigration Law"; this volume reflects their exceptionally lucid and candid assessments of the pending legislation. We are also indebted to Michael Addison, Provost of Earl Warren College at the University of California, San Diego, and to Sheldon Krantz, Dean of the School of Law at the University of San Diego, for their assistance in the organization of the symposium. The event itself would not have been possible but for the extraordinary efforts of the staffs of the Warren College Provost's office and the Center for U.S.-Mexican Studies; among them, we would like to express a special thanks to Donald Wyman,

Graciela Platero, Margaret Delgadillo, Kitty Morris, and Rojielynn Arcega for their contributions in planning and organizing the program. The symposium was made possible by generous grants from the Chancellor's Associates of the University of California, San Diego, the William and Flora Hewlett Foundation, the Tinker Foundation, the Andrew W. Mellon Foundation, the Ford Foundation, the Rockefeller Foundation, and the Gildred Foundation.

Publication of a volume of this type is never possible without the collaborative efforts of many individuals; we would be remiss, however, not to mention two of them in particular. We owe a large debt to Sandra del Castillo for the many hours of painstaking editorial assistance which she has contributed to this anthology, from beginning to end. Finally, we would like to acknowledge the tireless efforts of Gwen Bargsten, who typed, revised, and typeset the entire manuscript and contributed her invaluable expertise in design and format to the production of this work.

Wayne A. Cornelius
Ricardo Anzaldúa Montoya

May 19, 1983



THE POLITICAL ECONOMY OF IMMIGRATION

by Aristide R. Zolberg
University of Chicago

It is self-evident that transnational movements today — and in the contemporary epoch as a whole — would be much larger if all those disposed to leave their country of origin and allowed to do so had a place to go. On a continuum from free transnational movement to total immobilization of populations within their native countries, the contemporary world comes much closer to the restrictive pole. Whatever factors incline individuals to stay in their country or to leave it, the countries of potential destination determine the actual level and character of transnational flows.[1]

As is widely acknowledged the direction and size of transnational migration is governed largely by the attempts of individuals to overcome the consequences of the accidental location of their birth; and it stands to reason that the main direction of the flow will be toward more favorable locations. But it is insufficiently understood that global socioeconomic and political inequality determines potential migration only. By policing peaceful entry, as well as by defending themselves against armed invaders, those born in the more fortunate countries preserve benefits which they believe would quickly dwindle if extended to all outsiders who aspire to partake in them.

Nevertheless, substantial immigration has recently taken place, triggering off considerable interest among

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1. This doctrine was invoked by the United States as a foundation for regulation, as set forth by the U.S. Supreme Court in *City of New York v. Miln*, 36 U.S. 102 (1837). See also Hannah Arendt, *The Origins of Totalitarianism* (New York: Harcourt, Brace, Jovanovich, 1973): 278; and Richard Plender, *International Migration Law* (Leiden: A. W. Sijthoff, 1972).

social scientists beyond the specialized field of demography. Most of their analyses have sought to explain why advanced industrial societies not only admit some people from the less developed parts of the world, but even engage in positive action to induce such migration. This literature, however, has failed to stress the limited character of such policies, in terms of quantity and duration, against the general background of immigration restriction. Indeed, no sooner had these findings been published than the flows on which they were predicated were deliberately brought to a halt, or at least substantially reduced. Most explanations of the current trend toward restriction emphasize the conjunctural conditions of slow growth and rising unemployment, or they refer to the intrusion of non-economic factors. But this essay will show that unfavorable conjunctures merely render latent problems more manifest, and that even from the perspective of capitalists in the best of times, restriction is a necessity.

Immigration and the Dynamics of Capitalism

The economic dimension of policy determination has received considerably more theoretical attention than any other. With respect to the impact of immigration on the receiving country, the findings of conventional economic theory and of theory in the Marxian tradition (usually the work of sociologists and other non-economists) generally tend to complement each other.[2] As any beginning student of conventional economics knows, an increase in the supply of any factor of production will reduce the average cost of that factor and the overall costs of production. If that factor is labor, return to capital is likely to increase. In relation to a given supply of indigenous labor, the introduction of additional workers from abroad will produce such effects. Leaving aside the question of skill level and assuming intersectoral mobility of labor as well as perfect substitutability of immigrants for natives, immigration will tend to reduce the wage income of native labor; but at the same time, *total* domestic income will rise because any drop in native income from labor will be more than offset by the increase in native income from capital. In reality, however, substitutability of immigrants for natives is seldom perfect, and immigration tends to reduce the wages of *some* indigenous workers, while stimulating economic growth in the receiving country as a whole.[3] On the basis of economic considerations, immigrants tend to be viewed by employers as a welcome addition to the labor pool and by certain sectors of indigenous labor as unwelcome competition, while the position of the general public is on the whole less well defined.

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[2] They differ considerably, however, with respect to analysis and evaluation of the impact of *emigration*, especially of workers, on the sending country.

Capital is particularly likely to avail itself of immigration to quickly increase the labor supply in the course of specific conjunctures, as when demand for goods increases at home or abroad, while the native labor supply remains stable or even decreases as a consequence of a downturn in births, a loss of population through war casualties or emigration, or of the allocation of indigenous labor to some non-economic use, most commonly military mobilization. The incentive to use immigrant labor also increases when indigenous labor succeeds in increasing its share of total income by way of collective bargaining, favorable legislation, or regime change.

The contribution of economic theory to the determination of immigration policy has been mainly to confirm the wisdom of ongoing capitalist practices in this sphere and to legitimate them by demonstrating that they are in accord with the national interest — i.e., with widely shared aspirations to economic growth. To simplify matters, such theory has focused on "immigration," a permanent transfer of persons from one state to another. However, economic theory would suggest that the advantages afforded by the possibility of external *procurement* would be maximized if this were coupled with the possibility of external *divestment.*

In the absence of colonial conditions or of other unusual circumstances such as a population shortage (defined in relation to some aspiration to maintain or achieve international power as occurred in 19th-century

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3. Mark R. Killingsworth, "Effects of Immigration into the U.S. on the U.S. Labor Market: Analytical and Policy Issues," in *U.S. Immigration: Global and Domestic Issues*, ed. Mary M. Kritz (New York: D.C. Heath, 1982): 10-11; Simon Kuznets, *Modern Economic Growth* (New Haven, Conn.: Yale University Press, 1966).

France), these economic considerations dictate a preference for migrant labor over immigrants; and the more specifically that procurement can be tailored to conjunctural needs by regulating duration of stay, skill characteristics, and sector of employment, the lesser the incidental costs. The basic orientation of capital in the sphere of immigration therefore consists of a preference for a manpower-related migration policy with maximum practicable flexibility in relation to conjuncture.

An enriched version of the same hypothesis can be formulated by way of analysis in the Marxian tradition. Most of the recent theoretical literature in this mode, stimulated in Europe by the proliferation of guest workers and in the United States by a contemporaneous increase in the flow of undocumented workers from neighboring less-developed countries, stems from Marx's conceptualization of modern migration as a distinctive process occurring within capitalism. As Marx conceived it, the process involves both the formation of a "surplus population" under pressure to relocate in order to survive and the concomitant use of this population by industrial capital to maximize profitability.[4] In his first comments on the subject, Marx insisted that the migration of the Irish during the potato famine and its aftermath was a "forced emigration provoked by great landed property, the concentration of goods, the use of agricultural machinery, and the introduction of large-scale enterprise." More generally,

> it is not the lack of productive forces that creates a population surplus, it is the increase of productive forces that demands a reduction of the population and gets rid of the surplus by famine or emigration. It is not population that exercises pressure on productive forces, but

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[4] See, for example, Michael Burawoy, "The Functions and Reproduction of Migrant Labor," *American Journal of Sociology* 81: 5 (1976): 1082; Elizabeth M. Petras, "The Global Labor Market in the Modern World Economy," in *Global Trends in Migration: Theory and Research on International Population Movements*, eds. Mary M. Kritz, Charles Keely, and Sylvio Tomasi (New York: Center for Migration Studies, 1981): 44-63; and Alejandro Portes and John Walton, *Labor, Class, and the International System* (New York: Academic Press, 1982).

> productive forces that exercise pressure on population.[5]

These comments adumbrate the theory of surplus labor in Volume One of *Capital*, in which Marx argues, in short, that a "population surplus" is not a purely demographic phenomenon — as in Malthus — but is rather a product of capitalism:

> The laboring population . . . produces, along with accumulation of capital produced by it, the means by which itself is made relatively superfluous . . . and it does this to an always increasing extent.[6]

Furthermore, that surplus population becomes in turn "a condition of existence of the capitalist mode of production." It forms "a disposable industrial army" necessary, among other reasons, because "there must be the possibility of throwing great masses of men suddenly on the decisive points without injury to the scale of production in other spheres." It is quite evident that the industrial reserve army cannot function without the mass displacement of populations. Whereas migration is here mentioned only incidentally, it is an implicit mechanism of "the floating, the latent, the stagnant" forms that the surplus takes.[7]

Using the United Kingdom as his major case study for the analysis of capitalism, Marx viewed the Celts, and particularly the Irish, as typologically most characteristic of the surplus population-migration-industrial reserve army nexus. As Marx put it in an often-quoted passage:

> Every industrial and commercial center in England now possesses a working-class divided into two hostile camps, English proletarians and Irish proletarians. The ordinary English worker

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[5] Karl Marx, *Oeuvres Politiques. Tome II: Lettres sur l'Angleterre* (Paris: Alfred Costes, 1929).

[6] Neil J. Smelser, ed., *Karl Marx on Society and Social Change* (Chicago: University of Chicago Press, 1973): 107-108.

[7] Ibid., p. 118.

> hates the Irish worker as a competitor who lowers his standard of life. In relation to the Irish worker he feels himself a member of the ruling nation and so turns himself into a tool of the aristocrats and capitalists of his country against Ireland, thus strengthening their domination over himself. He cherishes religious, social and national prejudices against the Irish worker . . . The Irishman pays him back with interest in his own money. He sees in the English worker at once the accomplice and the stupid tool of the English domination in Ireland . . . This antagonism is the secret of the impotence of the English working-class, despite their organization.[8]

Leaving aside the historical particulars, the Irish can be considered the archetype of immigrant labor under conditions of industrial capitalism also in that they constituted a distinct cultural group, generally considered by the receiving population as their inferior.

Whether or not the pattern under consideration is "a condition of existence of the capitalist mode of production," Marx's insights highlight some advantages of external procurement which economic theory alone cannot explain. The recent literature inspired by Marx's work has argued that, under prevailing historical conditions, labor migration is predicated on the formation of a general economic relationship between a more- and a less-advanced country (or region), commonly referred to as "core" and "periphery." The core-periphery relationship determines the formation of a "population surplus" in the periphery, leading part of it to enlist in the ranks of the core's "industrial reserve army." Given different levels of general development, the costs of reproducing and maintaining the labor supply are lower in the periphery than in the core; moreover, by admitting only specified categories of workers from the periphery and sending them back when no longer needed or productive, the core is able to transfer some of these costs to the periphery altogether.

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[8] Michael Hechter, *Internal Colonialism: The Celtic Fringe in British National Development, 1536-1966* (Berkeley: University of California Press, 1975): 15.

The "human capital" approach of neoclassical economic theory could probably replicate this calculation of the savings generated by employing migrant labor from a less-developed country. But this is not the case with what follows.

In the usual run of things, countries that are likely to become linked into a core-periphery structure differ markedly with respect to culture; and the processes engendered by the core-periphery relationship insure that these differences will not only become accentuated in the course of development, but that the economically dominant society as a whole will view them in hierarchical terms. Externally procured labor thus tends to be not only cheap, as conditions in the periphery induce its population to sell their labor in the core below the going wage there, but also to be composed of a culturally distinct group, generally considered inferior. Antagonisms engendered by competition among workers within the labor market of the core are exacerbated by cultural segmentation among them, thus facilitating maintenance of social control over the working class as a whole. Finally, when core and periphery consist of different sovereign states, and the core is a liberal democracy, the fact that immigrant workers are aliens usually means that they can be denied many of the political and social rights of natives; and prevailing cultural judgments legitimate such practices. Their lack of rights renders them more vulnerable, and as a vulnerable group, they also tend to be more docile. Thus, the alien status of immigrant workers affords additional advantages to capitalists in the receiving country during the immigrants' period of residence.

As suggested at the outset of this section, the two leading approaches generally concur in their findings with respect to the economic impact of immigration on the receiving country. Whether to legitimize the practices of advanced industrial societies or to denounce them, they agree that, on balance, the capital sector of such economies stands to profit from the adoption by the state of policies that result in the procurement of labor from less-developed countries. However, analysts of either stripe have kept their eyes so very much on the most obvious aspect of the process — ongoing labor flows — that they have failed to note the concurrent emergence of a universal general policy in relation to which labor-procurement policies of the deliberate or laissez-faire variety are adopted. The policy baseline in relation to which labor procurement tends to arise is the generalized restriction of population movement from less- to more-developed countries. Indeed, the existence of such restriction is a necessary condition for the profitability of labor procurement.

From an economic perspective, restriction serves to protect receiving societies against excess labor supply. That indigenous *labor* would wish to do so is obvious; but why should capital incline in this direction? If some increase in the supply of labor above the level achieved by endogenous processes is advantageous to capital, a very much larger increase would seem even better. But this is by no means the case. Again, either approach can explain why not.

As noted earlier, Marx viewed the Irish as a "surplus population." He saw them as typifying the "disposable reserve army" which he believed to be "a condition of existence of the capitalist mode of production"; but he also insisted that the increase of productive forces "demands a reduction of the population and gets rid of the surplus by famine or emigration." He failed, however, to examine the relationship between the two fates to which "surplus population" was subjected in the United Kingdom: migration to fill the bottom ranks of the British industrial labor force, *and* emigration abroad, preferably outside the Empire altogether. Was this an instance of the inherent contradictions of capitalism? Or were British capitalists acting irrationally?

On the contrary, British practices made a great deal of sense in the light of the extreme consequences of a very large surplus population when it is located *within* the boundaries of the "core" state, as was the case in the early part of the nineteenth century, when the Irish constituted approximately one-third of the total population of the United Kingdom. However minimal the costs of maintaining each individual member of the "disposable reserve army" when not mobilized into the market they obviously become very substantial in relation to total national income when this "army" constitutes a large proportion of total population. Maintenance can take the form of income transfers (relief and so forth), as was done to some extent for the *English* "surplus population" under the old and the new Poor Laws; but the Irish (whether in Ireland or Britain) were denied this benefit throughout the first half of the century. In the absence of such provisions, they tended to take matters into their own hands — actions encompassed by Eric Hobsbawm's concept of "primitive rebellions," or more organized movements to alter conditions: rent strikes, boycotts, and efforts to change the regime.[9] In short, the internal surplus population must be kept relatively small in relation to the total, or, if it should become very large, the excess must be eliminated. Optimally, the "disposable reserve army" is kept fully external to the state, so that it never constitutes a surplus *within.* Switzerland has probably come closest to approximating this objective in the twentieth century.

The consequences of an excessive labor supply can also be understood in narrower economic terms. To be rendered productive, labor must be combined with other factors of production, the supply of which is relatively limited. The availability of some labor above and beyond the ongoing number of jobs produces downward pressure on wages and is likely to stimulate further capital investment; beyond a certain point, however, capital becomes very scarce and hence much more costly; wages reach some minimal floor; and demand for additional output peters out. Should the labor supply continue to increase beyond this point, the social costs of income transfers to the excess will mount. Borne of necessity by the productive sector (capital and employed workers), they will rise steeply *on a per-capita basis.* This situation is most obvious in a welfare state in which the entire population is entitled to such transfers, paid for out of taxes. But even if the excess labor is denied such benefits — as in the case of unemployed guest workers in many European countries and illegal aliens everywhere — income transfers of some sort will occur if numbers are very large. These transfers occur for reasons already indicated in the discussion of "surplus population" within the Marxian framework. Moreover, if it receives no individual income from wages or transfers and is prevented from taking matters into its own hands by way of successful social control, excess labor is likely to generate considerable consumption of collective goods, such as sleeping in streets and parks, squatting, and using forests as fuel and wildlife as food. Of course, the costs of social control and of collective goods are ultimately borne by the productive sector.

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[9] Eric Hobsbawm, *Primitive Rebels* (New York: Praeger, 1963).

But how does the problem of excess immigrant labor arise? Entries governed by policies founded on criteria other than strict manpower calculations — the admission of refugees, family members, returning citizens or quasi-citizens ("patrials") — constitute the most obvious source. The more interesting case concerns the formation of an excess of immigrant labor as the incidental consequence of a procurement-oriented immigration policy. In this respect, the leading explanation points toward "networking," a process which may be understood as an unforeseen consequence of the capitalist dynamic.[10] When the flow is induced by the establishment of a core-periphery relationship between two states or countries, the processes which govern the formation of a "surplus population" in the periphery will seldom be so finely tuned as to produce one of optimal size. Once the migratory flow gets under way, it tends to grow of its own accord, regardless of current conditions in the receiving state.[11] Paradoxically, such situations are most likely to arise when capitalists of the core best succeed in having the procurement aspect of immigration policy cast in the form of laissez-faire. Even where legal barriers to entry and work exist, they are seldom completely insurmountable.

It would appear, at first sight, difficult for an economic theory predicated on a tendency toward market equilibrium to account for such a process: the migratory flow should grind to a halt when demand for labor in the receiving country bottoms out. However, a continued flow of immigrants in a period of rising domestic unemployment is regulated by the market mechanism operating in its most rational form. Leaving aside the temporary excess that may occur as the result of information lag, of conjunctional downturn, or of the intrusion of non-economic factors — as when migrant workers succeed in gaining the right to stay in the receiving country when not needed or to bring in dependents — two processes come into play. First, the extreme wage differential between the two countries, in combination with the fact that the workers initially think of themselves as migrants rather than settlers, insures that workers from the periphery, who intend to maintain their original low standard of living and to transfer their savings to the country of origin, expect that they will be able to sell their labor at such a low price that they will always find a buyer, even in a period of high native unemployment. And, in fact, their calculations are quite correct. As the flow continues, displacement occurs; the excess thus formed consists not of immigrants but of natives. The replacement of the latter by the former is rational from the point of view of the receiving economy as a whole, since the displaced native is commonly entitled to income transfers. Secondly, the wide gap in the income of individual workers living in countries at very different levels of development stems not only from wage differentials, but also from substantial differences in income from collective goods provided by the respective countries. Notwithstanding their many discomforts and problems, advanced industrial societies with liberal regimes provide their residents with many more universally prized valuables such as disease-free environments, freedom from arbitrary exactions, or sheer entertainment and variety of life, than do less-developed countries. In some sense, the lower the wage income of the immigrant worker in the receiving country, the more prominently access to collective goods not available at home figures in that person's total income. As indicated earlier, the preservation of such collective goods is one of the factors which determines the necessity of restriction; but access to them cannot be easily denied to anyone physically present in the society. Overall, the pressure for entry can be thought of as permanent, and some will always squeeze through.

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[10] Portes and Walton, *Labor, Class, and the International System.*

[11] Marcus Hansen, *The Atlantic Migration: 1607-1860* (New York: Harper Torchbooks, 1961).

In actual practice, the insistence on the necessity of restriction is seldom voiced directly by capitalists themselves, among whom some will be found to advocate relative liberalism even in the midst of the worst possible conjuncture. Indigenous labor, where it has a voice, will be an important component of the restrictionist camp; this fact is so self-evident that little more needs to be said about it, except that in the course of bargaining and coalition-making, native labor may accept limited forms of immigration, including deliberate labor procurement, either on non-economic grounds or as an economic trade-off. Once labor immigration occurs, it is faced with the further choice of keeping these workers at arm's length or enlisting them into its own ranks. The more interesting implication of the preceding analysis, which pointed toward the importance of social costs in the form of income transfers and consumption of collective goods, is that we should also expect a restrictionist thrust from those in the collectivity most attuned to these matters. In contemporary receiving states, they are the elected and administrative officials of the welfare establishment as well as, in more diffuse form, taxpayers.

Capitalists, of course, carry a great deal of weight in the determination of economic policies in capitalist states; but in liberal democracies, public policy seldom reflects the interests of capitalists alone. As Adam Przeworski and Michael Wallerstein have suggested, "if workers opt for capitalism under some conditions, then . . . the state institutionalizes, coordinates, and enforces compromises reached by a class coalition that encompasses both workers and capitalists."[12] Taking into consideration that capitalists and workers are also taxpayers and that their specific interests vary in relation to sector and conjuncture, we can make sense of the economic dimension of immigration policies as particular outcomes of such compromises. But these compromises occur within the constraints accounted for in the previous discussion. Overall, one should therefore expect the emergence of immigration policies that combine a *general* restriction with *specific* devices for labor procurement and divestment. This inherent dualism is often manifested in the formulation of policies that divide modes of entry into two segments which can be thought of, respectively, as a "main gate" and a "back door."[13]

Conclusion

The preceding analysis argues that the current proliferation of restrictive measures in advanced industrial societies does not constitute a fundamental change in policy, but rather the acceleration of a secular trend which responds to a combination of short-term conjunctural circumstances and more acute manifestations of the consequences of prevailing world conditions.

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[12] Adam Przeworski and Michael Wallerstein, "The Structure of Class Conflict in Democratic Capitalist Societies," *The American Political Science Review* 76, 2 (1982): 215.

[13] Aristide Zolberg, "The Main Gate and the Back Door: The Politics of U.S. Immigration Policy, 1950-1976" (unpublished paper, 1978).

At the dawn of the contemporary period, global economic and political processes vastly enlarged the domain of "push" forces, resulting in a huge mass of potential migrants propelled by choice, necessity, or sheer force. The fortunate few began immediately to erect gates to protect their economies and policies from the possibility of invasion by this mass, which consisted mainly of liminal aliens in relation to whom the collective western identity had historically formed itself. In the earliest stage, they often built these barriers by enacting particularistic restrictions directed against whatever specific groups happened to crowd at their gates. Nevertheless, since the erection of such barriers was a reactive process, they rarely completed the task in time to avoid some inflow, of varying size. Where the flow was substantial, resulting changes in the internal cultural configuration of the receivers brought about an eventual revision of the original limiting categories. By and large, Europeans or persons of European descent became much more acceptable than Third World populations, particularly if they were colored. In the second half of the twentieth century, when scientistic justifications for cultural discrimination came to be invalidated, restrictions tended to become merely quantitative, with no precise rationale offered for them other than their self-evident necessity.[14] The receiving society then generally organized the selection of eligible immigrants by granting to its members the privilege of bringing in their kin, and to the state the possibility of admitting some refugees. Two dilemmas perennially arise in this respect: the admission of kin and refugees engenders a chain of further immigration entitlements; and members of both categories also compete for jobs and generate claims for income transfers.

Concurrently, the pursuit of profit by capitalists and the more generally shared desire for sheer economic growth counseled the admission of a small flow of suitable manpower via the main gate or through a back door. Given the economic and political organization of the receivers, demand for external labor focused on disposable unskilled workers, to be procured at the lowest possible cost. But these criteria made it more likely that such workers would belong to cultural groups considered undesirable. The receivers tended to resolve the resulting dilemmas by devising various legal and administrative impediments to the permanent settlement and incorporation of such workers. However, these efforts repeatedly ended in failure. Back-door migrants tended to exploit favorable economic conjunctures and other imperative necessities — such as the need for their services in periods of international conflict — to improve their status. Moreover, the very character of liberal political regimes generally constrains their ability to perfect and to maintain over time the kinds of internal boundaries which will impede settlement and incorporation. Most recently, the success of foreign workers in overcoming their disposability has induced political tensions, and the onset of a general economic crisis has simultaneously turned these workers into an excess supply and made them more desperate than ever to stay. In response to these pressures, many states have developed the means to divest themselves of this "back-door" labor; but again, the reactive move toward greater restriction occurred too slowly to prevent substantial crossing of internal boundaries.

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[14] See, for example, Select Commission on Immigration and Refugee Policy, *U.S. Immigration Policy and the National Interest* (Washington, D.C.: U.S. Government Printing Office, 1981).

The secular trend with respect to main-gate policy constitutes a major mechanism for maintaining a world organization divided into differentiated statist societies with widely disparate levels of material welfare. There is no conceivable reason why this trend would be altered in the foreseeable future; and advanced industrial societies have many reasons for henceforth exercising extreme caution with respect to the back door. In the first place, it appears impossible to prevent back-door entries from becoming a source of permanent settlement, which reduces the economic rationality of external procurement while it increases other costs. Furthermore, the long-term trend among traditional receivers points toward a shrinking of the sectors which benefit most from the procurement of foreign workers. A more rational policy would facilitate the movement of capital to the cheap wage areas which have traditionally supplied disposable unskilled labor. And finally, the reluctant incorporation of the residue of recent migrations affords to the fortunate few a new internal reserve which will more than satisfy their likely short-term needs.

OF BORDERS AND STATES: A SKEPTICAL NOTE ON THE LEGISLATIVE CONTROL OF IMMIGRATION

by Alejandro Portes
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> *I am not sure the H-2 program, even in streamlined form, will work for the short harvest season in my state . . . . The system the New Mexico farmers have now works well for their needs yet the bill ignores this existing underground stream of migrant workers. It is hard to change employment habits . . .*
>
> *Senator Pete Domenici*
> *Congressional Record, Aug. 17, 1982*

It is obvious that the influence of the modern state on society is quite vast. However, in certain spheres of political activity, the desires of policymakers can be effectively countermanded by private actors, and the application of approved policies can interact with pre-existing economic and social structures to produce unexpected results. The present controversy over immigration reform in the United States is interesting because it represents one of those instances in which that gap — between the intentions of policymakers and advisors in the capital and daily events in the rest of society — is at its greatest. This gap actually consists of two components: that between present immigration law and its implementation, and that which separates current policy debates from the structure of economic and social forces deemed in need of "reform."

Present Immigration Rules and Their Implementation: Subverting the Law

In reviewing the determinants of the existing situation in immigration and immigration law, we must emphasize two key provisions of the 1965 Immigration Act. First, the law forbade unauthorized entry into the country and the overstaying of tourist and other non-permanent visas. These violations were made felonies, as was harboring an unauthorized entrant or overstayer, except that employing such a person was deemed not to constitute harboring. Second, the reunification of families in the United States was made a central criterion for admittance to permanent residence. Immediate relatives of American citizens were exempted from the quota limits established for each country, and others would immigrate under various preference categories.

Although the law exempted employers from liability, it could have been expected that the enforcement agencies of a country as mighty and as technologically advanced as the United States would easily defeat the efforts of Latin American and other Third World citizens to force their entry into the country. This expectation did not prove accurate. Once in the United States, unauthorized entrants wishing to stay could do so by marrying a citizen or permanent resident. Family reunification thus acquired a new meaning as a *de facto* regularization program for the unauthorized. Instead of official pardon, all they required were the favors of a single American. Up to 70 percent of legal immigrants from Mexico in recent years had resided previously in the United States and had acquired a claim during that period to one of the family reunification preferences.[1]

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[1] This estimate is based on the author's longitudinal study of Mexican immigrants, started in 1973. At that time, a sample of 822 legal Mexican immigrants were interviewed at border stations in Laredo and El Paso, immediately after completing immigration formalities. Results of this research have appeared in various publications. For a comparison of previously undocumented and first-time entrants, see my "Illegal Immigration and the International System: Lessons from Recent Mexican Immigrants in the United States," *Social Problems* 26 (Apr., 1979): 425-438; also Charles Hirschman, "Prior U.S. Residence among Mexican Immigrants," *Social Forces* 56 (June, 1978): 1179-1202.

The image of a powerful and technologically advanced country being overwhelmed by the poor of backward lands was so ludicrous that it prompted an inevitable conclusion: the United States did not *want* to stop the surreptitious flow. An alternative way of saying the same thing was that, while some officials and government agencies wanted to put an end to clandestine immigration, they could not do so because of forces inside and outside government. Among the many analyses of the historical origins of this situation, I find most lucid the one proposed by Robert L. Bach.[2]

Bach's analysis is based on the changing demand for and supply of low-wage labor in different segments of the American economy over time. In broad strokes, Bach describes the "classic" period of immigration to the United States, when the expanding American industrial economy drew heavily on the peasant labor reserves of Eastern and Southern Europe. Growing opposition to immigrant labor by domestic workers had as its ultimate cause the final settlement of the frontier, which closed the alternative of self-employment outside the industrial economy. Although working-class opposition became increasingly militant, it did not prevent the continuation and even acceleration of the immigrant flow in the years preceding World War I. After the war, attempts to re-initiate mass immigration were prevented by the National Origins Act of 1924. This legislation coincided in time with and represented an integral element of the "historic pact" between capital and organized labor, which regulated industrial conflicts in exchange for concessions to workers, such as protection from competition by foreign labor.

Underlying the support of northeastern industrial firms for the end of immigration — or at least the absence of their opposition to the move — was the availability of another huge reservoir of labor in the southern states. Employment of significant numbers of blacks in northern industries actually started before World War I, but it reached mass levels during the 1920s. By the beginning of World War II, blacks comprised a significant or majority component of the labor force in such industries as meat packing and auto making and in a number of services.

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[2] Robert L. Bach, "Mexican Immigration and the American State," *International Migration Review* 12 (Winter, 1978): 536-558.

Contrary to present views, black unemployment in the inter-war period was actually lower than among whites. In the northern states, the ratio of white-to-black unemployment hovered around two-to-one for those two decades.[3]

Northern industrialists could thus attend impassively to the closure of the immigration door. The same was not true in the West, where the labor needs of rapidly expanding agriculture, railroads, and mines were not being met. Southern blacks correctly opted for the superior wages and more subdued discrimination of the North, thus depriving southwestern growers and railroad builders of their labor. These conflicts were played out in the federal government in legislative debates and in the form of contradictory directives by different agencies. Bach lists several of the uneasy judicial and administrative arrangements through which southwestern capital was granted *de facto* access to Mexican labor while the government attempted to preserve the image of a tightly shut immigration door in the East.

The labor needs of World War II offered a strong justification for a more open government-to-government agreement to recruit and employ Mexican workers in southwestern agriculture. The fact that the Bracero Program was no war expedient but the expression of a long-standing labor demand was confirmed by the extension of the agreement after the war, first by administrative decree and then by an act of Congress. When in 1964 the pressure of church groups and organized labor brought about a repeal of Public Law 78 (the Bracero Program), the Mexican labor flow simply went underground. Friendly local arrangements between growers and the Border Patrol and restricted Congressional appropriations ensured that immigration enforcement did not effectively impede border crossing. If anything, the new situation merely tightened labor discipline by adding the potent threat of deportation to the arsenal already in the hands of employers. This arrangement proved so workable that it quickly spread beyond the border and even the Southwest to become adopted by growers in other agricultural regions. More importantly, the clandestine flow began reaching the cities, where it filled low-wage, menial jobs in small industrial and service firms.

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[3] Edna Bonacich, "Advanced Capitalism and Black/White Relations: A Split Labor Market Interpretation," *American Sociological Review* 41 (February, 1976): 34-41.

At this point, Bach's analysis is supplemented by other recent studies, in particular those of Bonacich, Piore, and Geschwender.[4] These authors concur in attributing importance to generational shifts in the supply of unskilled and semiskilled labor to industries and services, particularly in the Northeast and Midwest. As we have seen, the primary mechanism to meet that demand in the post-World War I period was internal migration, mostly of southern blacks.

The children of these migrants, like other second-generation minorities before them, aspired to significant improvements in their situation. Yet social and economic forces have pressured northern-born blacks to remain in positions similar to those occupied by their migrant parents and grandparents. Quite predictably, the blockage of their aspirations, supported by glaring racial discrimination, has led to a series of mobilizations and protests. More importantly perhaps, this frustration has also led to the progressive withdrawal of the second generation from the low-wage labor market. The resistance of younger blacks to continue filling low-prestige menial jobs for minimal wages and the absence of another ready source of domestic labor for this segment of the market underlies the progressive reliance of employers on clandestine immigrant workers.

Industries and service firms did not deliberately create this flow; they simply took advantage of an arrangement which had been working well for years in the Southwest. By redirecting these foreign workers toward the cities, urban employers gained a supply of workers that was not only new, but also qualitatively superior. The reason for this assessment is that immigrants typically have greater work motivations and a different evaluation of available wages. Whereas domestic workers often accept menial, minimum-wage jobs only when there is no alternative and leave them as soon as possible, Mexican laborers will work willingly and reliably at the same task for the same or lower wages. Through this process, unauthorized foreign workers have become a "preferred" labor force for many industries, even when a domestic supply is available. The situation furnishes an exact parallel to that of the 1920s and 1930s studied by Edna Bonacich. At that time, southern black migrants were the "preferred" labor force.

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[4] *Ibid.* Michael Piore, ***Birds of Passage: Migrant Labor and Industrial Societies*** (New York: Cambridge University Press, 1979); James A. Geschwender, ***Racial Stratification in America*** (Debuque, Iowa: William C. Brown, 1978).

This mode of supplying the low-wage market has worked so well that it has been rapidly extended to the entire country. Mexicans now replace blacks in the Florida citrus groves and in the traditional migrant trek through East Coast agriculture. Dominicans and Colombians are widely credited with the "revival" of the garment industry in New York, via sweatshops, and of other traditional industries in New England. In her study of the changing New York economy, Saskia Sassen-Koob suggests that unauthorized immigrants now form the backbone of an increasingly diversified personal services industry catering to the needs of white-collar workers in banking and other highly paid finance and management services.[5]

At the other extreme, sources of supply have diversified also. At present, the entire Caribbean area, including Mexico, provides a vigorous impulse to the clandestine flow. The present situation is one in which towns, cities, and entire regions in these countries are closely linked, through informal networks, with labor markets in the United States. A detailed study by anthropologist Patricia Pessar documents, for example, how remote villages in the mountains of the Dominican Republic are informed, with a lag of only a few days, of changing labor market conditions in New York. Prospective immigrants and their families can tailor their strategies accordingly.[6]

A few years ago, I tallied the economic interests for and against clandestine labor immigration. The balance heavily favored continuation of this flow.[7] In addition to rural and urban employers desirous of preserving access to foreign workers and prepared to fight to maintain it, an array of other groups benefit indirectly from the flow. These include larger companies which do not hire unauthorized immigrants directly, but rather subcontract production to smaller enterprises that do; it also includes middle- and upper-income workers, who benefit from the lower prices of goods and services produced with cheaper immigrant labor. Governments of the sending countries have not been known to oppose vigorously the movement either; aside from the loss of skilled workers (who may eventually return), labor migration is both a significant source of foreign exchange for these governments and a short-term means to alleviate domestic unemployment.

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[5] Saskia Sassen-Koob, "Exporting Capital and Importing Labor: The Role of Caribbean Migration to New York City," Center for Latin American and Caribbean Studies, New York University, Occasional Paper #28 (New York, December, 1981).

[6] Patricia R. Pessar, "The Role of Households in International Migration and the Case of U.S.-Bound Migration from the Dominican Republic," *International Migration Review* 16 (Summer, 1982): 342-364.

Finally, organized labor in the United States is seldom pitted directly against immigrants, since the latter fill demand in the sector of smaller, non-unionized firms. Although trade unions have been firmly opposed to clandestine immigration, their militance on the issue has been attenuated by the fact that most of their members have not confronted directly the threat of cheaper immigrant labor. Thus, the segment of the American population most directly and most negatively affected by the presence of unauthorized entrants is the one least able to defend itself: the non-unionized and largely minority workers forced to compete directly with immigrants for semiskilled and unskilled jobs.

This analysis was written at the time that the Carter administration was readying its proposals on immigration. The balance of economic forces just outlined led to the inevitable conclusion that, unless another vast pool of willing low-wage labor was somehow discovered, the immigrant flow would continue. Indeed, the Carter administration's proposals faced insurmountable opposition and had to be abandoned. In their place, the President appointed a study commission. After lengthy deliberations, this commission issued a series of recommendations which formed the basis of a new legislative effort, the Immigration Reform and Control Act of 1982.

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[7] Alejandro Portes, "Labor Functions of Illegal Aliens," *Society* 14 (September-October, 1977): 31-37. A more extensive version was published as "Why Illegal Migration? A Human Rights Perspective," *Human Rights and World Order*, ed. A. Said (New York: Praeger, 1978).

Employers, the State, and Prospects for Reform

Having outlined the historical process which led to present immigration patterns and the subversion of existing law, we can now examine the character of the present immigration debate and the chances for success of the proposed legislation. Naive proponents of immigration reform continue to act as if the present situation were a matter of neglect by government and as if decisive action would therefore bring an end to the "silent invasion." However, most prominent advocates of reform are well aware of the composition and strength of the opposition. The gap between the world of policymaking and the world of labor markets and profits is not based today on misperceptions of the forces at play.

Support for continuation of unauthorized immigration has become stronger in the years following the Carter proposals as more and more firms have come to rely, directly or indirectly, on this source of low-wage labor. On the other side, a weakened labor movement does not appear to have significantly increased its ability to fight this ploy. Since the structure of economic interests is so skewed in favor of the *status quo,* the questions are: why should there be a proposal for immigration reform at all, and why should it actually stand a good chance of passage?

The missing element, in my view, is the autonomous interest of the state as a corporate entity. An elementary Marxist analysis portrays the state as a servant of capital or as torn between capital's different factions. The state does indeed preside over class society, and the long-term logic of official actions is toward preservation of the existing class order; but these functions do not confine government to the role of a mere instrumentality. As a corporate entity concerned with its own preservation, the state can and will defend the basic attributes of its sovereignty. The present struggle over immigrant labor in America is taking place not only between different social classes, but also between a segment of capital and the state.

This situation has evolved as a consequence of the very success of clandestine immigration as a supplier of low-wage labor. As long as the arrangement was confined to rural areas in the Southwest, it did not seriously threaten the image of state impartiality and control. At that time, the flow could be defined as the low-key "concession" to regional interests while preserving the illusion of a firmly shut immigration door. The spread of this labor arrangement to the entire country, the multiplication of countries of out-migration, and the increasing transparency of the entire process has created a situation in which the state appears to have lost a major attribute of its sovereignty.

In its official commentary on the Immigration Reform Bill, the Justice Department echoes a sentiment repeated many times in recent months: "We must regain control of our borders," declares the document, implying that they have somehow been lost to foreign forces.[8] In fact, if control has been relinquished at all, it has been to a segment of America's own employers. The fact that the present immigration confrontation has occurred between the state and a sector of the dominant class explains why those at the forefront of the reform movement are not the trade unions or the organizations of the ethnic minorities, some of which have actually opposed the proposed legislation. Instead, proponents include agencies and officials of the executive branch; quasi-official consultative bodies; editorial writers and academics; and an array of policy advisory groups, ranging from those motivated by xenophobic fears to those genuinely concerned with preserving the rule of law.

The intentions of many of these individuals and groups are, without doubt, commendable. However, the interest of the state in this issue has grown not so much because unauthorized immigrants are coming and are being employed as because the entire process has become so visible. The generalized perception that the government has "lost control of the borders" seriously undermines its legitimacy and hence its ability to enforce other rules domestically and negotiate with governments abroad. Had the flow remained a low-key affair, as in previous decades, the state would surely have remained willing to accommodate the interests of influential locals in the Southwest. Hence, the oft-declared need to "do something" about clandestine immigration will lead, ultimately, not to a serious attempt to stop the flow, but to restoring the image of state control in this area. The real gap which separates proponents of immigration reform in Washington from events in the rest of the country lies in their belief that once the law has passed, social and economic reality will adjust to the legal writ.

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[8] United States Department of Justice, "The Immigration Control and Reform Act of 1982."

There is no instance in the independent history of the United States in which a class of capital owners has been denied access to a preferred labor pool without either its substitution by a more vulnerable source or a protracted struggle. An incident of this kind was partially responsible for the American Civil War. Even after the defeat of the Confederacy, southern owners found devices to keep their former slaves dependent and on the land.[9] As this essay has shown, the end of European immigration and the "historic pact" with trade unions in the 1920s came about only because industrialists had begun to tap a new and more pliable labor source from the South. Similarly, western growers and railroad builders accepted the closure of the traffic in coolie labor because Mexican workers stood ready to fill the gap. When the immigration door officially closed in 1924, administrative procedures were devised to keep the Mexican flow coming. When the Bracero Program was formally terminated in 1964, the movement simply went underground and then flourished.

Unless their pronouncements are cynical, proponents of the present reform seem to believe that this bill will actually countervail two centuries of labor relations. The proposed legislation stands a good chance of passage because of the perceived need to do something to appease the clamor against the "silent invasion." Followed perhaps by a period of vigorous and visible implementation, the new law will restore the necessary image of state control over national borders. The long-term application and consequences of this legislation are, however, another matter.

Hispanic minority organizations have correctly diagnosed the situation and for that reason are opposing the

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9. Geschwender, *Racial Stratification in America.* See also Stanley Lieberson, *A Piece of the Pie: Black and White Immigrants since 1880* (Berkeley: University of California Press, 1980).

bill as written. They realize that the charming scenarios of Washington policymakers have a way of being subverted in reality.[10] In appearance, these organizations should be among the most enthusiastic supporters of immigration control, since it would presumably mean less competition for minority workers. In fact, minority leaders understand that measures taken in the name of protecting the rights of the downtrodden have in the past been transformed into new instruments of control.

In the present case, the most likely outcome is that passage of the proposed legislation will neither stop clandestine immigration nor deter its utilization. Learned proponents of the bill can go home pleased with their grand achievement, since they will not be there to pick up the pieces. In the absence of an alternative source of willing low-wage labor, employers will continue to rely on unauthorized immigrants, but they will take certain precautions to protect their businesses and themselves under the new conditions.

As production and service activities are driven underground, the situation of immigrants and domestic minorities working alongside them is likely to deteriorate. Work settings will become more clandestine, and at least part of the increased cost of doing business under the new conditions will be passed on in the form of lower wages. Production can be subcontracted down to illegal sweatshops or to those employing so few workers that they are exempt from the new penalties. Piece-rate homework will become still more common. Violations of fair labor standards laws will become even more difficult to detect.

During the debate on the proposed bill, Senator Edward Kennedy noted this crucial gap between the law and its implementation. He made the point eloquently:

> It is hard to believe that the limited enforcement provisions in this bill will control these pressures, especially when we look at the cutbacks in the enforcement of existing laws — the fair labor standards law, or farm contractor

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[10] See, for example, A. S. Torres, "Employer Sanctions and Employment Discrimination," memorandum to Senate staff, League of United Latin American Citizens, July 8, 1982.

> compliance provisions, or minimum wage provisions. How in the world do we think we will ever be able to enforce employer sanctions when we can not enforce existing laws?[11]

This well-founded skepticism underlies the opposition to the proposed legislation by representatives of those ethnic minorities which would presumably benefit most from it. If the above analysis is correct, passage of the bill as written will accomplish the re-legitimation of the state in a crucial area, but it will neither significantly alter the flow of unauthorized immigrants nor improve the condition of domestic workers working alongside them.

Options

Critics of legislative attempts at reform are themselves often criticized for failing to offer an alternative. As the preceding argument makes clear, the effectiveness of any proposed change is ultimately based not on its quality or persuasiveness, but on the strength of the forces backing it. Given sufficient time, the existing legislation or its implementation will be molded to fit the conveniences of the hegemonic classes and groups in the existing social structure. It is in this sense that the present immigration situation corresponds well to the balance of economic interests and political power.

Assuming, however, that at some future point an alliance of labor unions, minority organizations, and other groups is able to alter this balance, we may ask what alternative policy options that alliance should entertain. In my view, solution of the unauthorized entry "problem" under those conditions would not require multiple-dated amnesty programs or a multimillion-dollar identification system; rather, it could be accomplished largely on the basis of existing legislation. Such an alternative program would be based on three elements:

Nationwide enforcement of existing fair labor standards and minimum wage legislation, regardless of the nationality and legal status of workers. If enforcement would reach every employer and if penalties were consistently applied, the following long-term consequences would follow:

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[11] *Congressional Record: Senate,* August 12, 1982, S.10316.

- Firms would have less incentive to hire clandestine immigrants, since they could not be made to work "hard and scared" because of their vulnerability.
- Domestic workers would have greater incentives to compete for and hold jobs, since working conditions and wages would improve.
- Labor organizations would develop greater facilities to organize immigrant workers and incorporate them into unions, since the barriers of illegality and inferior working conditions and the threat of deportation would be removed.

Cooperation with governments of the sending countries for the promotion of small-scale agriculture and labor-intensive industries, with a parallel program of incentives for repatriation based on credit facilities. Empirical research has consistently shown that clandestine immigration does not involve the least educated and most pauperized strata of the sending population. Instead, it is composed overwhelmingly of ambitious young men who have been denied access to stable, well-paying jobs in industry or to the credit required for farming or starting a small business. Similarly, the available evidence also indicates that most unauthorized immigration is cyclical in nature and that remittances and savings not used for consumption are invested in small-scale agriculture and businesses. The availability of credit for these activities in the home country should accelerate return migration and discourage additional clandestine entries.

Stepped-up border enforcement targeted on commercial smugglers. At present, governments of sending countries have little incentive to cooperate in border enforcement programs. Besides receiving short-term economic gains from the flow, they are loath to persecute their own nationals for the "crime" of seeking a better life. These governments do, however, recognize commercial smuggling as an exploitative and even criminal activity. Suppression of commercial smuggling is thus a legitimate goal for both sending and receiving nations; it is also more effective than efforts to apprehend individual immigrants. A joint border-enforcement program represents the counterpart of cooperation in the promotion of small-scale agriculture and industries in sending countries. The latter initiative will offer the required incentive for sending governments to cooperate in the effort against organized smuggling.

In combination, the above measures would improve the well-being of workers in both sending and receiving countries. I have provided evidence elsewhere that the differences in wage levels between less-developed and advanced economies seldom cause migration from one country to another. Instead, people migrate because they cannot obtain the minimal income required for a modest living and some opportunities for advancement in their own country. The proposed measures should increase such opportunities. In the United States, they would help break down artificial barriers between poorly-paid domestic and immigrant workers. Employers should be penalized, not for hiring foreigners, but for carrying exploitation of any person beyond the limits of what is today socially acceptable.

THE FAILURE OF UNITED STATES IMMIGRATION POLICY

by Charles B. Keely
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The United States made radical changes in immigration policy in the mid-1960s. National origin quotas were abolished; numerical limits were placed on Western Hemisphere immigration for the first time; and the Bracero Program, two decades of large-scale temporary labor movements, was unilaterally discontinued by the United States.

These changes, in concert with other domestic and international political and economic changes, set into motion forces that were only vaguely perceived at the time. During the past decade, one result of these forces — undocumented migration — has produced a library of Congressional hearings, GAO reports, research studies, press releases, editorials, and magazine articles. Illegal migration, in short, has dominated the immigration debate.

In the second half of the 1970s, refugee movements joined illegal migration in the spotlight of concern. Indochinese resettlement, Haitians coming to Florida, the Mariel boatlift from Cuba, and Salvadorans seeking asylum each in turn raised concern. Refugee movements and asylum claims led to a questioning of refugee policy and eventually to legislative action on such basic issues as the definition of a refugee and the strategy and funding for their resettlement in the United States. These issues and others, like the role of the United States as a country of first asylum in the hemisphere, are still far from settled.

The level of concern was indexed not only by the amount of media coverage, but also by the number of federal task forces, committees, and commissions in the last decade. Since 1972, immigration policy has been the primary subject of investigation for five interagency task forces or cabinet committees in the executive branch, as well as the Select Commission on Immigration and Refugee Policy, created by an act of Congress. The major, but not the exclusive, concern of all these efforts was to control immigration. This was inescapable: you do not try to fix what does not appear to be broken. By the end of the 1970s it was widely asserted that immigration was simply out of control; but it ultimately took a decade of such political mobilization to produce a bill, the Immigration Control and Reform Act of 1982, known also as the Simpson-Mazzoli Bill.

The Simpson-Mazzoli Bill addressed some, but by no means all, of the issues and recommendations that had arisen in the previous decade of debate. As we face the possible watershed of the bill's passage, other important legislative issues not addressed in Simpson-Mazzoli need to be taken up. The Refugee Act of 1980 must be reauthorized in 1983. The grounds for exclusion of visa applicants, a collection of vague and outdated testimonies to past fears and prejudices, are ignored in the Simpson-Mazzoli Bill. The Select Commission did an admirable job in recommending a reformulation of the bases for denying visas. Their work has been lost — but not forgotten — in the rush to control immigrant flows. Naturalization law, always the stepchild of immigration policy, still needs attention.

The past decade of debate and concern, in short, has produced recommendations yet to be transformed into legislation, a refugee act which must be reauthorized, and a far-reaching immigration bill before Congress. Like potters who have molded their clay, we should stand back and look at what we have wrought before these creations are put in the legislative kiln and hardened into law.

Immigration policy, including the recommendations of the Select Commission and the contents of the Simpson-Mazzoli Bill, has much to recommend it. This decade does have highlights of creativity and compromise, sound judgment and efforts worthy of pride and respect. However, even though no social policy is perfect and none should ever be expected to work as planned, present policy on major immigration issues is a failure. Perhaps it is the best we could have done. Some of the clay will most likely be put into the kiln, and we will have to live with and adjust to the vessels of law that result. Those vessels will not, however, be of museum quality — and in my judgment will not serve us well even in daily use.

Why, on the major issues, is United States immigration policy a failure? The list of all the issues is too long to address in detail. My conclusion should not, therefore, be taken as a negative assessment of all that has been done. On the big issues, however — on employer sanctions, on legalization, on asylum, on temporary labor, on migration and foreign policy — legislation before Congress and the proposals emanating from the debate are incomplete and will create problems in many instances rivaling the conditions that they are supposed to correct. My conclusion that policy has failed is not the result of disagreement with the general thrust or specific content of particular proposals or legislative provisions. On the contrary, whether one agrees or not with the thrust or content of these proposals, they are so incompletely developed that anticipating the outcome is like guessing a throw of the dice.

I will develop my argument by focusing on four types of failures in the policies proposed. The first type of failure is a statement of goals without specification of the methods to achieve these goals. The second is to present proposals that are quite detailed programs of mechanisms and procedures without a statement of goals. The third is to develop policies in which the stated goals and the proposed procedures are in conflict. Finally, certain important issues have been given lip service, but they seem to have been either lost or conveniently shunted aside because they were too much of a challenge.

The first type of immigration policy failure is a statement of goals without spelling out procedures. The outstanding candidate in this category is employer sanctions. Employer sanctions are supposed to "demagnetize" the workplace. The line of reasoning is as follows: People come illegally to the United States to work, and to stop their entrance at the border would be so expensive or require such draconian methods that reliance on border control would not be satisfactory. Although improvements at the border and in visa issuance can help reduce the flow, the motivation of wages is better addressed in the workplace.[1] The failure in the employer sanctions approach is that the mechanism of enforcement — a secure worker-identification system — is unspecified. The Select Commission called for a secure identification system but passed the buck by not specifying what sort of system should be developed. The Simpson-Mazzoli Bill calls for such a system and even specifies that it should be in place in three years. It then instructs the President to do the job.

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[1] I would note that this emphasis on work overlooks illegal migration for family reunion. After all, illegal migration became an object of official concern in Congress over a decade ago. Does not the experience of Europe with family reunion of guest workers who stayed on, does not our

It does the country no good to say that we have a political consensus on the issue of a secure means of identifying authorized workers. We also have a consensus about the need to reduce unemployment. While it may be no small victory in political terms to decide to have a secure worker-identification system, that decision does not constitute policy. The method chosen will have major implications for American life. The system chosen and the method of implementing it will affect employment discrimination, the extent of fraud in documents, indeed the integrity of officially issued documents from birth certificates to passports, the cost to employers and, some would say, civil liberties.

I want to underscore that my judgment of failure does not rest on the more controversial issue of whether such an identification system is a threat to civil liberties. Some, like Senator Alan Simpson, claim that a secure worker-identification system is not a slippery slope of deteriorating civil liberties and government intrusion. Others, like Congressman Robert García of New York, Chairman of the Congressional Hispanic Caucus, oppose the Simpson-Mazzoli Bill precisely on the grounds of the potential for discrimination in its employer sanctions provision.

Wherever one stands on that issue, there can be scant confidence that an employer sanctions system can work (at an acceptable economic, political, and social cost) until we know what the secure worker-identification system is to be. What it should be or will be does not result from a lack of suggestions. The policy failure here is the inability and unwillingness, evidenced in the Select

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common humanity suggest that illegal migration, not for work but for family reunification purposes, will continue to take place and even increase? Perhaps focusing on one cause at a time is all we can do. The employer sanctions strategy ignores the family motivation and concentrates on the attraction of jobs and wages. But that is not the failure I want to underscore.

Commission's report and in the Simpson-Mazzoli Bill, to specify the means to the stated goal. The Commissioners and Congress cannot hide behind the excuse that the mechanisms are a purely technical matter best left to the civil servants to devise and put in place.

Thus, whether the centerpiece of a program to control illegal migration will work is unknown because all we have is a statement of a goal to reduce illegal migration and a plausible strategy — but not a very successful strategy in other industrial countries — to control access to jobs. We do not have a clear policy consensus on controlling illegal migration, and we will not have one until we know what the secure worker-identification system will be. Only then can we evaluate the policy. The Select Commission failed. Congress failed. What they said in effect is that we should have a policy. President Harry Truman was right. The buck stops in the Oval Office.

Another example of a policy goal without attention to mechanisms is the proposal to grant legalization or amnesty to illegals residing in the United States. Here I do not fault the policymakers so much as the administrators. The amnesty proposal has strong political support. Despite past presidential proposals for quite unattractive temporary legalization, the Simpson-Mazzoli Bill set a cutoff date of 1978 for full legalization and 1980 for those who will have to wait two extra years to become permanent-resident aliens. This two-tiered system allows for some checks in the rapid growth of demand for visas by relatives of newly legalized immigrants.

With amnesty, however, we are faced with the problem of how it is to be done. On this issue I do not expect that a law would detail these mechanisms. The proposal, however, has been around long enough, has been endorsed by executive task forces and included in two sets of presidential recommendations. Do state and local governments know what is expected of them or what they may face in respect to document issuance, fraud prevention, and inquiries regarding the *bona fides* of claims? Who will help to gather the necessary documentation, and what are the plans for publicizing the program? And what of those who came after the cutoff date or who fail to sign up? Will a major deportation effort be mounted? It is easy to list such questions, but the experience of other countries in conducting legalization programs does not instill confidence regarding the ease of answering them.

Perhaps someone is thinking about these issues and preparing plans. Since a legalization effort will require extensive intergovernmental cooperation and coordination with the private sector, those plans ought to be shared quite soon. The best-laid plans for an operation requiring so much collaboration hold little hope of success if they remain confined to members of strategy and planning groups made up of federal bureaucrats. We are not even administratively on track, much less prepared, to mount an effective legalization program. I suspect that in a few years a GAO task force will attempt to determine why so few people will have been legalized, in light of even the most conservative estimates of undocumented migrants in the United States.

The second kind of failure of United States immigration policy is elaboration of detailed procedure without stating policy goals. The outstanding example of this deficiency is the issue of asylum. Both the Select Commission report and the Simpson-Mazzoli Bill provide for a new cadre of specially trained immigration officers to hear asylum cases. The bill also proposes new limits on the review and appeals process. Many criticize the new procedures, along with rules for appeals of exclusion, as a reduction in due process for the sake of efficiency. Aliens, they claim, are often the easiest targets for diminution of the protections afforded by the Constitution.

My judgment of failure does not depend on the protection of due process, although there is cause for concern in that area. More fundamentally, we must ask what is the purpose or goal of the new asylum procedures? Under what circumstances, if any, does the United States see itself as a country of first asylum?

Are the new asylum officers anything more than a way to give legitimacy to a policy that the United States will not be a country of first asylum? Having specially trained people to process asylum applicants is not a policy response to challenges regarding the very notions of asylum and refugee, to the contemporary assault on international law and the international apparatus of response to refugee emergencies. The challenge is not to reduce expeditiously a long line of predetermined *mala fide* applications for asylum by people who are abusing the good faith of countries that honor the concept of asylum. Abuses do occur, of course, but they are not the heart of the problem. An administrative fix to reduce backlog, to send a signal of toughening resolve, is not a refugee or asylum policy. Since the asylum procedures are squarely in Title 1 of the Simpson-Mazzoli Bill — the control of immigration — I can only conclude that the intention of the bill's drafters is that the new asylum officers and procedures are intended to discourage applications.

The criticisms of current procedures are not just about how long they take. They also extend to the inconsistency — to the point of mocking the concept of equity — of decisions by the United States regarding who will be admitted to this country after seeking asylum or recognition as a refugee. We are inconsistent even after we deny asylum petitions. Poles who are denied asylum are generally given indefinite stays of deportation, while Salvadorans are not. A new corps, even with special training, to decide individual asylum claims will hardly answer the global, and especially hemispheric, challenge to the traditional role and behavior of the United States as a country of permanent resettlement. Perhaps the 1983 reauthorization of the 1980 Refugee Act will address these far-reaching issues. We have failed to grapple with them meaningfully so far.

The third kind of failure I see in United States immigration policy arises when stated goals and proposed amendments to law are incompatible. Temporary labor — the H-2 program — is the problem. Experts disagree about the need for and the wisdom of expanding the temporary-worker program. The administration could legally take steps to broaden the program, but President Reagan proposed a politically more cautious route in suggesting a two-year pilot program limited to 50,000 agricultural workers. The Select Commission categorically opposed an expanded H-2 program. The Senate report on the Simpson-Mazzoli Bill states that the Judiciary Committee rejected proposals to adopt a massive new temporary- or guest-worker program.

The Simpson-Mazzoli Bill, however, proposed streamlined procedures for application and decisions about seasonal agricultural workers under the H-2 temporary-worker program. While the bill would not make a grower's wildest dreams come true, you can drive a lot of pickups filled with temporary workers through its H-2 provisions, which harken back to the Bracero Program rather than establish a new guest-worker program on the European model. Whether one supports or opposes temporary labor, it is not good policy to say one thing and make proposals that will do another.

The final type of policy failure involves making assertions that are acknowledged as important and even crucial, but that fail to muster ideas, analysis, and proposals. To underscore the relations between immigration and foreign policy, which is by now common currency, is to present a trivial conclusion as a profound insight. Extending the argument to say that the global migration of workers affects international relations just as the redistribution of capital or changes in production and trade patterns affect international relations does not take us much further.

Foreign policies such as military or political interventions do stimulate migration. In some instances, such as the pressures on Vietnam to reduce movement of boat people or Indian intervention in Pakistan's 1971 civil war, foreign policy aims at restraining migration. Migration can also be a tool of foreign policy. Western countries and the United States in particular have greeted refugee movements from Communist countries (such as the exodus of Cuban Mariel boat people and the migration of ethnic Chinese from Vietnam into ASEAN countries) and utilized them for propaganda purposes. And refugees are not the only tool. Bangladeshi policy on worker migration to the Middle East, for example, takes into account economic and political relations with Islamic countries as well as the benefits of the employment and remittances of workers. Past migrations can affect current foreign policy because of the activities of ethnic group members descended from immigrants; and past foreign policy, especially colonization, affects current flows.

This partial listing of connections, while it may make us recognize more concretely that migration and foreign policy have a history of practical and analytic linkages, is really only a gloss on an assertion of connectedness. What are the links between migration and global relations? Where are the case studies of the mutual impacts of migration and foreign policy which have led one to alter or shape the other? What have the government and non-government foreign policy communities suggested to integrate migration into analyses of foreign policy and international relations? We in the foreign policy and immigration fields have never developed a body of solid descriptive work on the topic, much less dependable analysis. In the training of foreign relations analysts and practitioners, migration is usually treated as a marginal if nettling issue. Diplomats prefer to deal with issues of real importance, which is another way of saying that they desire to deal with issues that they are familiar with and comfortable in tackling. If the issue of migration becomes central to foreign policy, diplomats usually approach it as a problem of containment and putting out fires.

My review of immigration policy leads me to conclude that we have failed. I do not say that all has been failure. On the large questions, however, the record is not good. The record I refer to is a record of incomplete and unfinished effort. Although each of us has an opinion regarding the wisdom or folly of the direction of policy on each substantive issue, I do not base my conclusion of failure on whether or not to have sanctions, legalization, and a temporary-worker program, or to be a country of first asylum or not. My charge is based on the contention that in each of these major areas and in pursuit of integration of foreign policy and migration, we have not followed through.

Perhaps we will muddle through and be able to live with the results of our incomplete attempts to forge an immigration policy. After all, government action is not the only, and probably not the most important, ingredient in the life of societies. It is too important, however, to ignore. At this point, we should not start patting ourselves on the back for a difficult job well done after a decade of effort. Mistaking effort for achievement — exalting political process over outcome, confusing passage of a bill with policy — is the unredeemable failure.

FROM SELECT COMMISSION TO SIMPSON-MAZZOLI: THE MAKING OF AMERICA'S NEW IMMIGRATION LAW

by Lawrence H. Fuchs
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During the 1970s a new debate on immigration policy began in response to immigration and refugee flows in that decade, a debate which culminated in the Simpson-Mazzoli Bill. The pressures for comprehensive reform began to build for three specific reasons: first, the number of refugees to be permitted under the 1965 Act (17,400) was clearly too small in a world of heightened turmoil and at a time when refugee policy increasingly had become an aspect of foreign policy. Second, as a result of the 1965 Act, the composition of lawful immigration had become largely Asian, Latin American, non-Protestant and non-white, causing widespread concern about the assimilability of these "newer races." Third, and most importantly, an increasing number of illegal aliens were arriving in this country outside of the normal immigration channels, giving rise to the suspicion that large numbers of them were affecting adversely Americans' wages, their working standards, and even their chances for employment at a time of growing economic stress.

The first problem — a series of unexpected refugee flows resulting in special, *ad hoc* legislation outside of the immigration law — produced the passage of the Refugee Act of 1980. The new law not only provided an updated definition of refugees consistent with the United Nations protocol on the subject, but also set forth a method by which the President, with the advice of Congress, could prescribe and allocate the number of refugees to be admitted annually. The second issue — concern about the assimilability of immigrants and about their impacts on American society — was rarely raised explicitly with respect to race, so completely had a large majority of Americans expunged from open debate the racial preoccupations of earlier decades. Even the issue of cultural and linguistic assimilability, covered widely in popular and scholarly literature, formed no part of the immigration policy agenda in the 1970s. The main issue was what to do about illegal migration.

Presidents Nixon and Ford each appointed interagency task forces to examine the question, and the House of Representatives held a series of public hearings, the most important of which lasted six days in February and March of 1975. Jimmy Carter, anxious to be recorded as an activist president, crowded the immigration issue onto his legislative plate in 1977. The Carter formula for dealing with illegal migration was to beef up conventional enforcement, adopt a system of employer sanctions to punish those employers who hired undocumented workers, and to grant amnesty to a substantial number already in this country. The problems with his proposal were that the employer sanctions plan failed to call for a secure means by which employers could identify employees who were eligible to work, and the amnesty proposal provided a large number of illegal aliens with temporary-worker status without specifying what would happen to them after the expiration of that status.

And there was another problem. Major forces concerned with immigration within the Democratic party were in strong disagreement. Organized labor wanted employer sanctions, but Hispanic Americans and civil libertarians did not. In addition, the Carter package did not attempt to relate the problem of illegal migration to overall immigration policy. Senator Edward Kennedy and Representative Peter Rodino, chairmen of the Senate and House Judiciary Committees, felt that the time had come for a comprehensive review of all aspects of immigration and refugee policy and a thorough rewriting of the Immigration and Nationality Act. They argued for the creation of a Select Commission on Immigration Policy (the second in U.S. history), which was created by statute in October, 1978. The findings of this Commission, they hoped, would lay the basis for the building of a political consensus which would enable the Congress to reform immigration policy in a fundamental way. The Commission began its substantive work in December of 1979 and reported as called for by law on March 30, 1981, almost five months after the presidential elections. Did it build the consensus on which reform can now go forward?

"Forecasting is very difficult," remarked the redoubtable Sam Goldwyn, "especially about the future," so I will not try to predict what will happen to the Simpson-Mazzoli Bill. But if anyone had forecast there would be such a thing as a Simpson-Mazzoli Bill two years ago, they would have been judged silly, to say the least. Even if one assumed that the Commission would achieve consensus on major issues, it would have been reasonable to expect that it would take at least several years for Congress to act. The Dillingham Commission on immigration policy reported in early 1911, but it took Congress until 1917 to pass its recommended literacy test over President Wilson's veto and until 1921 to legislate national origins quotas. The Presidential Commission appointed by Harry Truman proposed an end to those quotas in 1952, but Congress did not act until 1965.

As it turned out, under the leadership of Chairman Reuben Askew and his successor, Father Theodore M. Hesburgh, the Select Commission did achieve remarkable consensus on some broad assumptions, findings of fact and even specific recommendations. There was no disagreement at all on certain fundamental assumptions:

- That the world of nation-states would be with us for a long time to come and that the United States would continue to set quantitative and qualitative limitations on immigration.

- That migration pressures from refugee flows, from those seeking work, and even from those just seeking opportunity would continue to grow because of growing global consciousness and increasingly effective means of transportation.

- That although transnational issues such as migration require international cooperation and solutions and every effort should be made to achieve them, it would be difficult to do so.

- That the United States would continue to remain a society which values highly the rule of law and immigration policies which are free of bias based on race, color, ethnicity, or nationality.

The Commission was also unanimous with respect to certain findings:

- The immigrants and refugees who have been lawfully admitted in recent years, as in decades past, have helped to strengthen the United States in a variety of ways — contributing to its economic, cultural, and scientific progress.

- Although the illegal migration of persons may have contributed to overall economic growth, such migration tends to have a pernicious effect on Americans and resident aliens who compete for jobs with undocumented workers; and the existence of an underclass of exploitable illegal aliens is harmful generally to American society.

The Commission emphasized keeping the "front door" of legal immigration open, indeed widening it just a little bit by making the system through which immigrants are admitted lawfully more equitable and efficient. But the Commission also insisted on closing the half-open "back door" to illegal migration.

Believing that there was a relationship between what happened at the front door with activity at the back and even the side doors, the Commission recommended changes in U.S. lawful admissions policy to expedite the flow of spouses, minor children, and parents of both U.S. citizens and resident aliens. It voted 12-to-4 to increase the number of numerically restricted aliens from 270,000 to 350,000 and by a similar vote called for the elimination of country ceilings for spouses and minor children of permanent resident aliens. It has also recommended the provision of 100,000 visas a year for five years to eliminate present backlogs.

By unanimous vote the Commission called for two separate tracks for admitting immigrants — family unification and independents — with an enlarged number of non-unification spaces for those prospective immigrants who have no family in the U.S. to use as a basis for immigration.

But the Commission realized that increasing lawful admissions slightly would at best make only a small dent in illegal migration pressures. And its members recognized that the major proposal for rechanneling illegal migration — a large-scale guest-worker program — might actually increase those pressures in the long run; not a single commissioner supported that idea in the final vote. The curtailing of illegal migration, the Commission decided, required a four-pronged approach: enhanced border enforcement; increased enforcement of laws regulating wages and working standards; an employer sanctions law to penalize employers who hire illegal aliens; and legalization of a substantial number of illegal aliens in this country who had arrived before January 1, 1980.

Although the consensus of commissioners on these and other issues was strong, it would have been foolhardy to predict swift Congressional action on their recommendations, particularly after the 1980 elections. A Republican president and a Republican-controlled Senate received those recommendations from a body whose membership included ten Democrats, one independent and only four Republicans. It was not even clear in the months that followed the elections whether or not the Senate Subcommittee on Immigration would be revived and, if it was to be reestablished, who its chairman would be. Nor had it been decided who would chair the House Subcommittee on Immigration. Senator Kennedy, one of the proponents of the Commission, yielded his seniority on the Judiciary Committee. Chairwoman Elizabeth Holtzman had been defeated in her bid for a Senate seat and would be gone from the House. The man intended to succeed her as chairman of the Immigration Subcommittee in that body, Father Robert Drinan, already quite knowledgeable on immigration and refugee matters, decided to follow the instructions of a papal decree and not run for reelection.

Enter Alan Simpson and Romano Mazzoli. The former, an active member of the Commission from its first meeting, was asked by Senator Strom Thurmond to chair the reborn Subcommittee on Immigration in the Senate; the latter, a diligent participant in the more than 20 hours of Commission meetings following the elections but otherwise new to the issues, was given the assignment in the

House. Both took charge as determined, vigorous proponents of early action. The Reagan administration, instead of repudiating the Commission's work as a Democratic plot, recognized its bipartisan character and appointed a task force to work closely with the Commission's staff as it wound down its work in March, April and May.

The continuity between the Commission and the Congress was considerable. Simpson chose two Commission staff members to be on his senior staff. Representatives Robert McClory and Hamilton Fish, Republican House Commission members, chose another Commission staff member to represent them in the House. Commission member Peter Rodino continued as Chairman of the Judiciary Committee, and Commissioners Kennedy and Dennis DeConcini of Arizona constituted the Democratic side of the new Subcommittee in the Senate. After extensive hearings by both Subcommittees, the Simpson-Mazzoli Bills were reported out by the Judiciary Committees in both Houses, and the Senate overwhelmingly passed the Simpson version in August, 1982, only slightly over a year after the Commission's report.

The evidence is overwhelming that the work of the Select Commission had considerable influence on the development of the Simpson-Mazzoli legislation. Some major weaknesses in the Simpson-Mazzoli Bill reflect certain failures on the part of the Commission itself. For example, nothing is done in the Simpson-Mazzoli Bill to provide for a modernization of our system of exclusions, which are now archaic, difficult to administer, and in some cases unnecessarily harsh. The Commission knew this and wanted to do something about it but for political reasons dumped the problem in the lap of Congress, where it now sits unattended. Of even more importance, the Commission realized that employer sanctions required a secure means of determining employee eligibility. But its members could not agree on the particular mode for an employee eligibility system, leaving that issue to the Congress, too — and the Congress passed it along to the President.[1]

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1. In all probability, a substantial majority could have been mustered for the upgrading of the Social Security card (an approach favored by Chairman Hesburgh, Senators Simpson and Kennedy, and others) had it not been for the strong opposition of the Secretary of Health and Human Ser-

In some respects the Simpson-Mazzoli Bill departs from the Select Commission recommendations. For example, the Select Commission recommended dropping crown colony ceilings which now apply detrimentally to Hong Kong. That issue was not even discussed in the legislative hearings. More significantly, the Commission's recommendations to increase numerically restricted immigration from 270,000 to 350,000 and to provide an additional 100,000 visas a year for five years to help clear backlogs were never given serious consideration in Congressional hearings. Although these proposals were considered thoughtfully by members of the Reagan administration interagency task force, they were dropped because of rising negative concern about immigration at a time of high unemployment.

The emphasis in the Senate debate on lawful admissions went toward restriction, not openness. The Commission had voted 15-to-1 to retain a system in which the spouses, children and parents of U.S. citizens and refugees are exempt from ceilings or targets, with Alan Simpson casting the sole negative vote. The Senate Bill as passed, however, includes a cap of 425,000 on all lawfully admitted immigrants. The legislators arrived at this figure by adding the 270,000 admissions permitted under the present world ceiling to 155,000 — the number of spouses, minor children, and parents of U.S. citizens who had been admitted exempt from numerical limitations in 1981, a figure which increased in 1982 to 187,000.

In some respects, the bill approved by the House Judiciary Committee (as distinguished from the Mazzoli Bill as first introduced) resembles more closely the Commission's recommendations — particularly with respect to due process issues, H-2 certification, the exemption of spouses, minor children, and parents of U.S. citizens from numerical restriction, and the general emphasis on family reunification. But key actors in the House decided that this was not the time to increase the number of lawfully admitted immigrants. Yet both Houses did follow the Select Commission in asserting the importance of keeping the front door open to admissions at least at present levels, keeping the admission of refugees

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vices, Patricia Roberts Harris. As a Commission member, Secretary Harris crusaded against recommending its use.

separate from that of immigrants, and providing for a substantial program to legalize illegal aliens now in the United States.

Indeed, the approach so strongly urged by the Commission — keeping open the front door while closing the back door — constituted the basic thrust of the Simpson-Mazzoli Bill as first drafted and submitted to Congress. While the Commissioners disagreed with respect to the tactics for achieving these goals, the consensus on broad goals and even on the strategy for achieving them was and is remarkably strong among them.

The problem now is that the Congress may do damage to the national interest by legislating short-sighted, restrictionist measures against lawful admissions (such as placing refugees under the same cap as immigrants or failing to enact a comprehensive legalization program) while at the same time taking rhetorical and largely ineffective steps to control illegal immigration. Such a strategy would keep the back door wide open for the entry of cheap, exploitable labor while giving symbolic satisfaction to restrictionists by narrowing the front door. Such a law would fly in the face of the fundamental findings of the Select Commission — that lawfully admitted immigrants strengthen the United States in many ways, while the failure to adopt effective measures to curtail illegal immigration is likely to make an already serious problem more difficult in the future.

EMPLOYER SANCTIONS: POLITICAL APPEAL, ADMINISTRATIVE DILEMMAS

by Manuel García y Griego
El Colegio de México

This essay[1] discusses the proposal that employers be penalized for hiring undocumented workers — the key feature of the immigration legislation introduced by Senator Alan K. Simpson and Representative Romano Mazzoli early in 1982. Although the 97th Congress adjourned without having passed the Simpson-Mazzoli Bill, similar legislation will likely pass, sooner or later. Thus, the question is no longer *whether* employer sanctions will become law, but what form they will take, how they will be administered, and with what consequences.

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[1] For documentation supporting most of the ideas presented here, see Manuel García y Griego, "La Comisión Selecta, la Administración Reagan y la política norteamericana sobre indocumentados: un debate en transición," in *México-Estados Unidos 1982*, ed. Lorenzo Meyer (México, D.F.: El Colegio de México, forthcoming); Manuel García y Griego, "The Importation of Mexican Contract Laborers to the United States, 1942-1964: Antecedents, Operation, and Legacy," in *The Border That Joins: Mexican Migrants and U.S. Responsibility*, eds. Peter G. Brown and Henry Shue (Totowa, N.J.: Rowman and Littlefield, 1983); México, Centro Nacional de Información y Estadísticas del Trabajo (CENIET), *Los trabajadores mexicanos en Estados Unidos: resultados de la Encuesta Nacional de Emigración a la Frontera Norte del País y a los Estados Unidos* (México, D.F.: CENIET, 1982); Manuel García y Griego and Leobardo F. Estrada, "Research on the Magnitude of Mexican Undocumented Immigration to the U.S.: A Summary," in *Immigrant Workers in the United States*, ed. Antonio Ríos Bustamante (Los Angeles: UCLA Chicano Studies Research Center, 1981); and Manuel García y Griego and Carlos H. Zazueta, *Approaches to the Estimation of Deportable Mexicans in the United States: Conjecture or Empirical Measurement?* Monograph Series, 2 (La Jolla, Calif.: Center for U.S.-Mexican Studies, University of California, San Diego, forthcoming).

The effects of employer sanctions will depend enormously upon how the sanctions are designed and administered; they may represent substantial social costs for persons legally residing in the United States, be they U.S. citizens or legally resident immigrants. The employer sanctions measure constitutes the most serious proposal currently under discussion for reducing the population of aliens illegally living in the United States and for curbing future flows of such immigrants. Whether future immigration legislation actually hinders undocumented immigration is likely to rest upon whether the concept and specific design of employer sanctions will achieve such a result. And the answer to that question depends not only upon how the employer sanctions law is written, but on unknown factors, such as how it will be administered and how employers and migrants respond both to the law and to its administration. No empirical model now available can predict with a reasonable degree of certainty the probable nature of such responses. Thus, the imposition of employer sanctions will represent a politically motivated gamble.

The logic behind employer sanctions can be expressed in the form of a series of interconnected assumptions. First, the vast majority of undocumented persons emigrate to the U.S. for the purpose of securing employment; i.e., the presence of undocumented workers in the U.S. can be attributed to the demand for their labor. Second, if employers are penalized by law for hiring such workers, the vast majority will refrain from doing so. Third, if employers refuse to hire undocumented persons, almost all of those presently in the United States will leave, and those who might consider entering the U.S. illegally will not do so. This chain of logic includes a fourth major assumption which is usually not fully discussed in debates over the pros and cons of employer sanctions. The argument assumes that an employer sanctions law can be written and administered so as to achieve the desired outcome at a reasonably low political cost. By "cost" I mean both domestic opposition to the effects of such legislation and the intergovernmental conflict that could result between the United States and the source countries of undocumented migration, such as Mexico.[2]

In order for employer sanctions to be successful from an administrative and technical point of view, the above four propositions must hold. Clearly, the first and third do. The presence of the vast majority of undocumented Mexicans in the U.S. depends on continued demand for their labor, and the refusal of employers to hire them would be sufficient to effect their return to Mexico. The debate over whether the employer sanctions concept will "work" revolves around the second proposition (that employers will refrain from hiring undocumented workers when faced with the threat of penalties) and around the actual effects, whether intended or not, of the specific forms that employer sanctions could take. But if the fourth proposition — that the law can be put into effect at a tolerable political cost — does not hold, then the proposal cannot succeed.

The Political Appeal of Employer Sanctions

In their administration, employer sanctions will pose some gnawing dilemmas, which this essay will explore later; but defending them as a policy proposal will prove irresistible. The political appeal of employer sanctions can be summarized in three broad arguments or observations. First, federal government bureaucrats at all levels share the general perception that undocumented migration is a serious problem that cannot be ignored. Sooner or later — and, according to this view, the sooner the better — it must be addressed. Second, the employer sanctions proposal represents the most logical and the only easily adopted measure that has not yet been explored. It is not a full-scale attack on the problem (it is less drastic, for example, than sending an armed force to the border to stop illegal entries); yet it represents more than repeating the measures of the past which have failed to control the phenomenon. Finally, employer sanctions can be designed in such a manner as to appear as a serious

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2. The concern of policymakers in the United States centers on whether employer sanctions will curb undocumented migration in general, not just of Mexicans. Nevertheless, this essay is limited to a discussion of the potential effects of employer sanctions upon Mexican migration.

attempt to solve the problem while allowing sufficient room in the area of administration for the containment of political opposition.

Defining the Problem

Public and official perceptions of Mexican migration to the United States, documented and undocumented, have a long history. The principal argument raised against illegal entries is that they violate the law. The argument conveniently ignores the fact that, historically, agents of the U.S. government have consciously observed this law only in the breach, but it is a powerful normative argument nonetheless. No one can realistically argue that a nation-state has no right to control the flow of persons across its borders;[3] but debatable issues do arise at a more specific level: How should the state exercise control over its borders? What problems arise when it does not exercise this control consistently? What moral obligations does it incur when the persons crossing its borders reside in a neighboring country with which it has a long history of complex and enduring ties?

During the 1970s the view that a large number of illegal entries by Mexicans constituted a serious problem did not find a receptive audience among the public in the United States. As the number of apprehended deportable aliens surpassed half a million per year, former Immigration and Naturalization Service (INS) Commissioner Leonard Chapman publicly dramatized the "illegal alien problem" in terms which evoked other views of immigration which also have a long history. Chapman's argument stressed that undocumented workers take jobs away from U.S. citizens; that they constitute a burden on the U.S. taxpayer as a consequence of their consumption of social services; that somewhere between four and twelve million undocumented persons were then residing in the United States; and that their numbers were increasing at a rate which varied between 500,000 and one million per year.

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[3] For a discussion of this point, including its interpretation by the United States Supreme Court, see Gerald P. López, "Undocumented Mexican Migration: In Search of a Just Immigration Law and Policy," *UCLA Law Review* 28 (Apr., 1981): 615-714.

The arguments which characterized undocumented migration as a serious problem during the 1970s emphasized empirical issues: numbers, socioeconomic effects, etc. Public awareness of the violation of U.S. immigration laws did not by itself translate into public concern. To bring about public concern, analysts who saw undocumented migration as a problem argued that this phenomenon implied harm to U.S. citizens in terms of lost jobs and increased taxes. Framing the problem in these terms, however, had the effect of implying that it had an empirical definition, subject to verification or rebuttal by fact. Small wonder, then, that the problem attracted many social scientists who prepared and published a seemingly endless stream of studies and reports. Each of these reports sought in its own way to define the *research* problem in technical terms and to solve it by employing one or another methodology and set of evidence.

Judgments about the conclusiveness of these studies varied widely. The Select Commission on Immigration and Refugee Policy, which could have made an effort to obtain authoritative answers to the questions under study but did not, judged the studies inconclusive.[4] Other observers argued less equivocally that, from the point of view of the United States, the net socioeconomic effects of undocumented migration were probably positive.[5] Whether or not one agrees with such judgments, one point emerges clearly: the context of the empirical debate has changed since the mid-1970s, when Chapman made his allegations. Although some members of the press still assert that undocumented migrants constitute a drain upon the U.S. economy, most U.S. government officials have deemphasized these empirical arguments.

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[4] U.S. Select Commission on Immigration and Refugee Policy, *U.S. Immigration Policy and the National Interest: The Final Report and Recommendations of the Select Commission,* Joint Committee Print, Committees on the Judiciary, House of Representatives and Senate, August, 1981 (Washington, D.C.: U.S. Government Printing Office, 1981): 41. It is interesting to note that discourse in government circles and the predominant definition of the problem characterize the undocumented migration phenomenon as a national calamity, while efforts to study the phenomenon have not been proportional to this level of concern. See, for example, the arguments advanced by the Select Commission for *not* conducting a national survey of immigration or otherwise gathering data on a national scale that would yield scientifically acceptable answers to these questions: U.S. Select Commission on Immigration and Refugee Policy, *[First] Semiannual Report to Congress* (Washington, D.C.: U.S. Government Printing Office, 1980): 6-10. This failure to investigate notwithstanding, the limited research efforts stimulated by the deliberations of the Commission suggest that the empirically verifiable reality of undocumented migration will not support predominant perceptions.

[5] See, for example, Charles Keely, "Illegal Migration," *Scientific American* 246 (Mar., 1982): 31-37.

Under these circumstances one might have expected that the definition of the problem might change, that the perceived threat of undocumented migration might attenuate, that the issue might have lost visibility rather than gained it. Following the deliberations of the Select Commission and the inauguration of Ronald Reagan, the implied definition of the problem *did* change, but not in the direction anticipated. The course which the debate has taken helps explain the durability of the perception in U.S. government circles that undocumented migration is a serious problem, the solution to which requires new measures — even if their enforcement involves some political and social cost.

The "new" definition of the problem and public attitudes based on the empirical assertion that undocumented migration harms the United States are mutually reinforcing, but the new definition no longer rests on those arguments. Rather, this new view emphasizes the normative components of the debate; it views the phenomenon as undesirable even if it does benefit the United States economically, because it is illegal or because it can be associated with vaguely defined social ills. The staff report of the Select Commission makes this point clearly:

> Now, in 1981, the United States finds itself in the ambiguous position of espousing respect for the law as a cornerstone of society, while refusing to make the enforcement of its immigration laws a priority. Until a more meaningful commitment to enforcement is made, illegal migration will continue to undermine the most valued ideals of this nation — the integrity of the law and the fundamental dignity of the individual. It is this undermining of national values that poses the greatest threat to U.S. society, not the displacement of U.S. workers or use of social services by undocumented workers. Jobs taken by undocumented workers sometimes do result in

> the displacement of American workers, and the presence of these aliens in the work force does have a depressing effect on U.S. labor standards and wages in some locales and some sections of the economy. While these conclusions of the Staff are disputed — at least as to emphasis — by some researchers, no one denies that national ideals are being compromised.[6]

This approach does not reject the thesis that some negative socioeconomic effects do result from undocumented migration; indeed, it finds the thesis reinforcing. But the argument rests on normative rather than empirical grounds.

Following the Select Commission report, the normative terms used to describe the phenomenon began to enjoy increasing popularity. Several political actors in highly visible forums have recently characterized the problem as one of reasserting national sovereignty.[7] Others have merely cast the problem in terms of reasserting control over the formulation and execution of immigration policy. Many persons within and outside the federal government perceive that "solving" the problem of undocumented migration has become a test of national will in an age when such will has diminished on many fronts.[8] Some individuals have gone beyond legal questions and focused on the long-term consequences of current immigration trends and have concluded that the uncontrolled growth of the Mexican-origin population poses serious and unique problems for the nation's destiny. These predicted consequences range from social and ethnic conflict a generation hence to linguistic fragmentation and even a potential loss of territorial integrity.[9] As this summary suggests, the issue of undocumented migration has moved within the space of a few years from a question with tangible and potentially verifiable dimensions to one which has a symbolic and normative character.

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[6] U.S. Select Commission on Immigration and Refugee Policy, *U.S. Immigration Policy and the National Interest: Staff Report of the Select Commission on Immigration and Refugee Policy. Supplement to the Final Report and Recommendations of the Select Commission* (Washington, D.C.: U.S. Government Printing Office, 1981): 560-561.

[7] See, for example, the testimony of Attorney General William French Smith in U.S. Congress, Joint Hearing before the House Committee on the Judiciary, Subcommittee on Immigration, Refugees, and International Law and the Senate Committee on the Judiciary, *Administration's Proposals on Immigration and Refugee Policy* (Washington, D.C., July 30, 1981); Sylvia Ann Hewlett, "Coping with Illegal Immigration," *Foreign Affairs* 60 (Winter, 1981-82); and Kevin F. McCarthy and David Ronfeldt, *U.S. Immigration Policy and Global Interdependence* (Santa Monica, Calif.: The Rand Corporation, 1982): 16.

[8] See Wayne A. Cornelius, "America in the Era of Limits: Nativist Reactions to the 'New' Immigration," Research Report Series, 3 (La Jolla, Calif.: Center for U.S.-Mexican Studies, University of California, San Diego, 1982).

These trends suggest that the debate on the socioeconomic effects of undocumented migration, though interesting in technical terms, is for the most part politically irrelevant. The government and the public will continue to perceive the phenomenon as a problem, no matter how analysts judge its benefits or detriments, until it encounters an "acceptable" political response, such as enactment of an employer sanctions law.

Why Employer Sanctions?

The authors of immigration reform proposals in 1982 had a number of alternatives for conceptualizing the phenomenon of undocumented migration:

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[9] For examples of this fear: that Mexican immigration could lead to separatism in the U.S. Southwest, see Richard Downes, "The Future Consequences of Illegal Immigration," *The Futurist* 11 (April, 1977): 125-127; and Arthur F. Corwin, "Epilogue: A Note on Acculturation," in *Immigrants — and Immigrants: Perspectives on Mexican Labor Migration to the United States*, ed. Arthur F. Corwin (Westport, Conn.: Greenwood Press, 1978): 353-354. Senator Alan Simpson's comments appended to the Select Commission's *Final Report* differ from the above in tone, but not in substance. "If immigration is continued at a high level and yet a substantial portion of the newcomers and their descendants do not assimilate," he noted, "they may create in America some of the same social, political, and economic problems which existed in the country which they have chosen to depart. Furthermore, as previously mentioned, a community with a large number of immigrants who do not assimilate will to some degree seem unfamiliar to longtime residents. Finally, if linguistic and cultural separatism rise above a certain level, the unity and political stability of the nation will in time be seriously eroded."

- First, they could have rejected the commonly accepted definition of the undocumented migration problem, both in terms of its putative seriousness and the specific consequences attributed to it. This alternative would probably have resulted in no legislative proposal at all in the area of undocumented migration control, although it might have been consistent with an increased allocation of resources to the INS. It also would have required the replacement of the existing definition of the problem with another.

- Second, they could have accepted the existing definition of the problem, which verges upon ascribing to it the character of a national calamity. This alternative would have resulted in proposed legislation which maximized the likelihood of success in reducing undocumented immigration by adopting a form of employer sanctions — coupled with other reinforcing measures — consistent with that objective.

- Third, they could have publicly accepted the existing definition of the problem, but privately conceded that passage of any legislation would require compromises with various interest groups, particularly employers. This alternative would have resulted in proposed legislation which maximized both the likelihood of passage and political benefits for its proponents without actually curbing undocumented migration.

The Simpson-Mazzoli Bill represents a package which traded off the kinds of considerations discussed in the second and third alternatives. Given that the authors of the bill accepted the existing definition of the problem — indeed, himself a member of the Select Commission, Simpson helped shape it — they would obviously see as necessary a substantive change in existing policy responses to undocumented migration. How, then, do employer sanctions fit into the context of available policy alternatives?

Without new legislation, the U.S. government would most likely respond to the undocumented migration phenomenon with a mass deportation campaign organized and conducted by the INS. Such campaigns are hardly new in the history of Mexican migration to the U.S., but such an option is being ruled out for now,[10] mainly because INS enforcement has apparently not effectively deterred undocumented migration. The number of deportable aliens located each year, the vast majority of whom are detected shortly after crossing the land border with Mexico, runs close to a million. These numbers have no historical precedent with the exception of the years 1953-54. Moreover, the claim that the undocumented population in the United States is growing by leaps and bounds goes unchallenged within government circles. Thus, during a given year the INS apprehends nearly a million undocumented migrants and the undocumented population still grows by upwards of half a million;[11] the strategy, therefore, has obviously failed.

If one accepts the above empirical and normative propositions, then the necessity for some kind of "controlling" legislation is obvious. The employer sanctions provision constitutes the only proposal on the current legislative agenda which lends itself well to this purpose: it can be designed within the highly visible arena of Congress and administered by the federal government alone. Many other proposed measures, such as increased policing of the northern border by the Mexican government or allocating some form of economic assistance to sending communities in order to "prevent" emigration, would involve bilateral or multilateral cooperation.

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[10] This does not mean, of course, that the INS does not presently expel people from the interior of the United States on a routine basis, nor that it does not occasionally mount small deportation campaigns, usually accompanied by massive doses of publicity. "Operation Jobs," a series of raids mounted in the final days of April, 1982, represents such a campaign. But even in such instances the actual number of persons expelled is only slightly higher than the average for a similar period during "routine" operations. Thus, it appears that the publicity associated with these raids is the actual aim of such operations, not the mass expulsion of all undocumented persons residing in the United States. See *Los Angeles Times*, Apr. 27 to May 1, 1982.

[11] Hewlett, "Coping with Illegal Immigration"; Michael S. Teitelbaum, "Right vs. Right: Immigration and Refugee Policy in the United States," *Foreign Affairs* 59 (Fall, 1980): 24-27.

Employer Sanctions: A Broad Concept

The extraordinary appeal of the employer sanctions proposal, therefore, rests primarily on the fact that it appears appropriate to the previously defined problem, and the concept is broad enough to suggest any number of alternative measures in practice. Thus, as the hearings on the Simpson-Mazzoli Bill demonstrate, it can be packaged in a way which is attractive to many groups within the United States, including employers, against whom the proposal is presumably directed.

Two other factors, moreover, contribute to the political appeal of the concept. First, employer sanctions can be justified with the argument that other countries — particularly in Western Europe — already have adopted such sanctions. Thus, the United States should accept the conventional wisdom and go along with the measures adopted by other countries in similar circumstances. This justification for the proposal ignores the fact that employer sanctions laws have not substantially reduced undocumented immigration in those countries that have employed the strategy.[12]

Secondly, the concept of employer sanctions appeals to a sense of equity: employer sanctions will, according to some of its proponents, redress an injustice in the law, which currently penalizes workers for illegally entering and working in the United States, but does nothing to their employers. The assumption implicit in this argument — that the administrators of the law will actually vigorously prosecute and penalize employers — merits skeptical examination. Arguments which question this assumption, however, will not detract from the political appeal of the employer sanctions concept.

Thus, proponents of employer sanctions can call upon any of several different arguments: "law and order," "conventional wisdom," "employer-employee equity." Under these banners, employer sanctions, as a concept, can and will be made palatable to groups with very different philosophies and political orientations. Adopting employer sanctions is a gamble and, in the view of some, an irrational and risky experiment; but to many within and outside the federal government, the proposal represents an eminently rational measure. Its consequences, though not entirely predictable (the effects of legislation never are), might be managed and perhaps contained among those ethnic and social groups least prepared to force the rest of society to suffer them. To this problem and the difficulties implicit in administering the employer sanctions proposal we will now turn.

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[12] See U.S. General Accounting Office, *Information on the Enforcement of Laws Regarding Employment of Aliens in Selected Countries* (Washington, D.C.: Aug. 31, 1982): 2. The fact that such laws have apparently failed in other countries does not mean, of course, that they would also fail in the United States, just as the fact that other countries have such laws does not mean that the U.S. should also have one.

The Dilemmas of Administration

In theory, employer sanctions provide an incentive for U.S. employers to probe into the immigration and citizenship status of each person hired and a disincentive to hire an undocumented alien. The concept thus allows the policymaker concerned with reducing the population of undocumented immigrants to reduce the problem to a technical question: under what conditions will these incentives and disincentives most likely discourage the hiring of undocumented workers in the United States? The answer to that question is threefold.

First, the vast majority of employers who presently hire or might be inclined to hire undocumented workers should perceive the disincentives to be real and significant. The penalties have to represent a deterrent, and the employer must perceive as substantial the risk of being caught and penalized. This situation can occur only if the employer sanctions law receives an adequate level of funding; its enforcement cannot simply be added to the list of duties already carried out by the investigative branch of the INS.

Second, those employers who presently rely to a significant degree on undocumented workers should be able to do without them. That is, such an employer must perceive that at least one of the following assertions about his business interests accurately describes his situation:

- The economic costs associated with going out of business and engaging in some other activity which does not rely upon undocumented labor would be tolerable.

- The business can substitute U.S. citizens, legal immigrants, and/or capital for undocumented workers, either directly or by restructuring jobs, yet maintain its competitiveness in the same activity.

- The business can replace undocumented workers with foreign workers legally admitted as temporary laborers, much as they presently are admitted through the so-called H-2 program, or as they were through the Bracero Program (1942-1964).

Although a bureaucratic-conservative approach would minimize the conflict implicit in these alternatives, they clearly pose some dilemmas. Undocumented workers serve an economic function in the United States, and doing away with them will imply fundamental issues of survival and change for many of the industries and activities dependent upon such labor. Thus, finding an acceptable alternative will often be necessary to bring about the required cooperation by employers.

Third, the U.S. government must perceive as tolerable the immediate political and social costs of imposing employer sanctions. (Although the long-term costs may be high, they will not likely influence the short-term politics of employer sanctions.) At first, this argument may appear to have little direct bearing on the issue of creating disincentives for hiring undocumented migrants. However, if the perceived costs of employer sanctions become intolerable, the legislation will not be enforced — and little disincentive for hiring undocumented aliens will remain. The "costs" will find political expression both as explicit lobbying to abandon the enforcement of such sanctions, and as unfavorable court rulings resulting from suits brought against their administration.[13]

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[13] The discussion thus far has treated the issue in purely technical-administrative terms and has not considered any moral issues, such as whether or not the employer sanctions provision will have "unjust" effects. Yet opponents of the measure often argue that the members of certain oppressed minority groups are the ones most likely to suffer from the adoption of such a measure because of the employment discrimination that it will cause. In terms of political considerations, however, these social costs figure in the equation only if they are both immediate and significant at the national level.

An employer sanctions law designed and administered so as to achieve its expressed purpose can thus be expected to encounter dilemmas in its administration. The attractiveness of the concept aside, a serious effort to implement it is likely to prove impractical. A scenario in which an employer sanctions law is written and enforced in such a way as to reduce undocumented migration substantially — without backsliding on the part of the INS and without a significant substitution of legally admitted foreign workers for the undocumented — is unlikely. Two other scenarios appear more probable.

A Symbolic Law

The history of U.S. immigration legislation is replete with examples of symbolic laws, including the contract-labor law of the past century and the "harboring an alien" clause first introduced in 1917 and then modified in the 1952 Immigration and Nationality Act. Thus, the Simpson-Mazzoli Bill would not be the first unenforceable or ineffective legislation passed by the U.S. Congress in the area of immigration. Such legislation serves a symbolic purpose — an expression of political ideals without political will; but it nevertheless serves as an objective indicator that something has been done about the "problem."[14]

Avoiding the introduction of significant loopholes into the legislation will not be easy. The Senate testimony on the Simpson Bill and the report of the staff of the Select Commission on Immigration and Refugee Policy reveal that Congress is sensitive to the concerns of employers. Businessmen feel that the Congress should minimize the recordkeeping requirements of any employer responsibility law and that the law's design should permit employers an affirmative defense against penalties, even under circumstances in which they actually hire an undocumented alien. Finally, Congress will not find it easy to add personnel and resources to a new regulatory activity as many areas of government shrink and agencies increasingly compete for the federal dollar.

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[14] For further discussion of the political utility of symbolic laws, particularly regarding the employer sanctions concept, see Kitty Calavita, "California's 'Employer Sanctions': The Case of the Disappearing Law," Research Report Series, 39 (La Jolla, Calif.: Center for U.S.-Mexican Studies, University of California, San Diego, 1982).

A symbolic law would not change the size of the undocumented population nor the volume of new flows. Employer and migrant behavior may take new forms in order to address the potential risk of sanctions, but the hiring of undocumented workers would continue. The law could thus easily result in a negative-sum situation, wherein the hiring of undocumented persons remains largely unaffected, but the social costs, in terms of employment discrimination against ethnic groups lawfully in the United States, increase. Although the effort to impose employer sanctions will most likely result in a symbolic law, another scenario is also possible.

Legal Disincentives for the Employment of Undocumented Workers

Assuming that the Congress can meet the conditions desired by bureaucratic conservatives — a law with no significant loopholes, effectively administered throughout the United States — employers will perceive strong disincentives regarding the hiring of undocumented workers. Will such a regime successfully modify employer and migrant behavior to achieve the desired outcome? The continued presence of undocumented workers requires the participation of both sets of actors; the elimination of one of these could obliterate the economic basis for the phenomenon. The employer sanctions concept assumes that if the knowing employment of undocumented workers stops as a result of a change in employer behavior, then Mexican undocumented migration will virtually come to an end. Is this assumption correct?

The answer to this question is a qualified "yes." While the employer-employee relationship does require the participation of both, the former dictates to a far greater degree than the latter the terms of that relationship. Although employee motivation, attitudes and behavior are not unimportant in determining the course and character of that relationship, the perceptions and behavior of employers — and the logic of profitable enterprise — are crucial to its definition.

Events during and following "Operation Wetback," the mass deportation campaign of 1954 aimed primarily at Mexicans, bear out this proposition. The campaign, conducted at a time when Mexican workers could enter the United States legally with a labor contract to work in agriculture, resulted in a massive substitution of contract laborers for "wetbacks." After 1954 the number of deportable Mexicans located by the INS dropped precipitously, and at the same time the number of contracts issued to Mexican workers rose sharply to the peak number recorded during the twenty-two years of the contract-labor program.[15] These events represent the single instance in the history of Mexican migration to the United States when administrative measures taken by the U.S. government decisively reversed the flow of undocumented migration.

Various factors account for the "success" of Operation Wetback in achieving its technical-administrative goal, but the most important among them is that the operation did not simply round up and expel Mexicans of questionable immigration status. (Had it done only that, we should appropriately question why similar efforts before and since did not accomplish the same objective.) Rather, Operation Wetback comprised a combined strategy of rewards and punishments. Directed mostly at employers, this strategy included convincing employers that they faced an increased risk of having the INS interrupt their use of undocumented labor, facilitating their access to contract labor, and "streamlining" the contract-labor program by eliminating those provisions to which employers objected most strenuously.

Operation Wetback also had social and political costs. The campaign involved the wholesale violation of the rights of Mexicans (of both Mexican and U.S. citizenship) in the U.S. and the dilution, with the acquiescence of the Mexican government, of the safeguards for workers in the Bracero Program. In fact, these safeguards deteriorated to the point that contract workers and "wetbacks" differed principally in that the former had a document stating that he was "legal," while the latter enjoyed somewhat greater freedom. The deterioration of worker safeguards and the massive noncompliance by employers with the terms of labor contracts led to the widespread perception that the Bracero Program had adversely affected the U.S. farm labor market. This development eventually led to significant opposition to the program in the United States, and in 1964 the U.S. government unilaterally cancelled the program.

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[15] In 1953 the INS had performed 865,000 apprehensions of deportable Mexicans, and about 200,000 contract workers entered legally; in 1955 the number of such apprehensions dropped to 243,000, while almost 400,000 contract workers entered legally.

Employer responses to the termination of the Bracero Program in 1964 varied enormously, depending upon the industry and activity. Some crops dependent on *braceros* disappeared; the growers of others substituted legal immigrants for contract workers; some employers used the H-2 provisions of the 1952 Immigration Act to hire temporary foreign workers, who helped ease the transition; still others reorganized their labor activities so as to reduce their labor requirements;[16] and a large but unknown number of farm activities became dependent on undocumented laborers. Thus, to some extent, employers created the "problem" of undocumented labor migration since 1964 as their solution to another problem — the unavailability of contract workers after that year.

This short history supports the view that employer perceptions and responses to government measures aimed at controlling labor migration are a crucial variable in determining the continued presence of Mexican workers in the United States. First, in order to "control" the illegal entry of Mexican workers, the U.S. government adopted measures which changed employer behavior by making the contracting of these workers more attractive. This resulted in a substitution of contract laborers for "wetbacks" in 1954-55. Second, in order to eliminate perceived adverse effects upon U.S. domestic workers, the government terminated the program in 1964, necessitating another change in employer (and employee) behavior.

The central assumption behind the bureaucratic-conservative view of employer sanctions — that influencing the behavior of employers is the key to controlling the employer-worker relationship — thus has empirical support. Nevertheless, we should underscore that the worker responses are even less predictable, particularly in the present context, in which the employer-worker relationship has different modalities and the policy proposal offers no alternative means of legal entry. We should recall in this regard that the measures taken in 1954 *regularized* the flow, and the action taken in 1964 ultimately caused it to go underground; in neither case did policy actions arrest the flow of Mexican migration.

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[16] David Runsten and Phillip LeVeen, *Mechanization and Mexican Labor in California Agriculture,* Monograph Series, 6 (La Jolla, Calif.: Center for U.S.-Mexican Studies, University of California, San Diego, 1981).

The implications of this fact merit examination. In the case of agriculture, growers have actively recruited Mexican labor and continue to do so; they are aware of their workers' legal status and sometimes assist the network of labor smugglers who bring them across the border. Employers in other industries who employ undocumented workers, however, are not always aware of the legal status of each individual whom they hire; others may suspect that their employees lack legal-residence documents but prefer to remain ignorant of the precise circumstances of each individual. Thus, in nonagricultural industries the employer — to a degree — passively receives available undocumented labor, and the attractiveness of such labor to the employer less explicitly relates to the undocumented status of the worker. Put in other terms, the labor characteristics sought by such employers coincide with many of those of undocumented workers, but they do not specifically require such labor. (Mexican workers in such industries usually earn minimum wage or better.) Under these circumstances, employer sanctions will act largely as an incentive for employers to probe into the citizenship and immigration status of each prospective employee; it will less likely serve as a disincentive for employing undocumented workers, since employers have a qualified interest in employing undocumented workers as such.

To the extent that the above argument holds, worker responses to the probing by employers regarding their backgrounds and documentation will be the more important effect of employer sanctions. For decades now, undocumented workers have trafficked extensively in birth certificates, "green cards," and other documents used to establish authentic identification for legal entry and residence in the United States. The adoption of employer sanctions, from the point of view of the worker motivated to enter the U.S., will unavoidably provide incentives for further trafficking in such documents.

The second scenario, an "effective" employer sanctions law, would probably provoke strong responses from both employers and workers seeking to maintain the status quo. Those employers who perceive a specific need for undocumented Mexican workers will follow the path of least resistance in securing a substitute: they will advocate a "streamlined" H-2 program. And they are likely to exact such a response, either through legislation or executive regulation, as the price of their support for employer sanctions. The behavior of other employers is less predictable, but that of their workers is not: they will seek, by every means available, the documentation necessary to provide their employers with an "affirmative defense" against employer sanctions. What is now being sold as a measure to punish employers will very likely end up punishing workers instead.

EMPLOYER SANCTIONS LEGISLATION IN THE UNITED STATES: IMPLICATIONS FOR IMMIGRATION POLICY

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Introduction

The Immigration Reform and Control Act of 1983 (also known as the Simpson-Mazzoli Bill) has as its centerpiece an "employer sanctions" provision which is heralded by the bill's supporters as a major step towards an effective preventive immigration policy. Their argument maintains that since illegal immigrants migrate primarily to obtain jobs in the United States, one has only to eliminate employment opportunities to minimize undocumented migration. While correct in their recognition that undocumented workers constitute first and foremost a labor force, Congressional supporters of the bill have chosen to ignore consistent research findings about employer sanctions, which make it illegal to knowingly employ an undocumented worker. That research has shown that employer sanctions are at best ineffective, and at worst exacerbate the vulnerability of both the documented and undocumented worker.

This essay places the employer sanctions provision in an historical and theoretical context, in an attempt to explain both the current sources of appeal of employer sanctions among policymakers and the predictable consequences of such a legislative provision. The study begins by delineating the rough outlines of a theoretical model of immigration policymaking as an attempt to resolve conflicts inherent in the political economy. It then gives attention to the origin and consequences of the 1971 employer sanctions legislation in California (the Arnett Law), both as an example of the utility of this perspective and as the basis for a discussion of the predictable impact of federal employer sanctions. The essay closes by applying this historical and theoretical perspective to the current federal proposal.

The Outlines of a Theoretical Approach

Even a cursory overview of U.S. immigration policies since the mid-nineteenth century leads to the conclusion that rather than a smooth evolution of policies forming a consistent package, the immigration policy landscape is a patchwork of frequently contradictory *ad hoc* policies directed at the pressing dilemmas of the moment.

This *ad hoc* approach and the resulting inconsistencies are evident, for example, in the treatment of Mexican workers during the Bracero Program (1942-1964). During several open-border incidents the Texas-Mexico borders were opened outright, while at another juncture "Operation Wetback" deported Mexican immigrants and their families in massive, indiscriminate round-ups. Frequently, this *ad hoc* approach has resulted in *concurrent* policies that are mutually contradictory. For example, during a 1921 Congressional debate, it was pointed out that our refugee policies potentially conflicted with the mandate to deport those suspected of harboring communist or socialist beliefs. The resulting paradox, urged one frustrated and confused Representative, was that we might be "admitting an alien [under our refugee policy] who would be deported after he got here."[1]

Our immigration laws have not simply been fitted to short-term, cyclical labor needs, as is often argued. Rather, our immigration history suggests that U.S. immigration laws can be seen as attempts to resolve a variety of dilemmas deriving from contradictions in the political economy — dilemmas such as the conflicting interests of capital and labor, uneven economic development, and a number of more narrowly defined political contradictions. The outcome is a series of policies which are frequently inconsistent and which are at best only momentarily adequate.

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[1] Fess, *Congressional Record*, 67th Congress, 1st Session: 586.

California Employer Sanctions and the Dialectics of Lawmaking

In 1970 the nation was in the throes of a long-lasting recession, the symptoms of which had not been seen since 1958, and California's unemployment levels surpassed even the national rate. In the 1970-1971 recession, as in every major recession since the late 1800s, policymakers and the media frequently explained rising unemployment and welfare costs as the consequence of an influx of immigrants — in this case, "illegals." Whether deliberately contrived or not, this blame-the-immigrant ideology shifts attention away from the possible structural sources of the recession and deteriorating working conditions and places responsibility instead on a particular category of worker.

So it was in California in 1971. The front page of the *Los Angeles Times* carried such warnings as "Illegal Aliens: Growing Peril to U.S. Worker."[2] The *San Francisco Examiner* echoed the message: "Tide of Illegals Rising . . . Hurts California Farm Workers."[3] One California Assemblyman expressed concern that illegal Mexican immigrants might damage the American economy "beyond repair."[4] While immigrant workers in California were used in this way to "explain" the recession, they played a pivotal role in such major California industries as agriculture, textiles, and hotels and restaurants. So profitable was this source of cheap labor that the Chambers of Commerce in American border cities of the Southwest apparently advertised its availability in the early 1970s in an attempt to attract industries to the area.[5]

As the immigrant-as-scapegoat ideology ran full force into the economic reality of immigrant employment, California legislators wrestled with a dilemma to which there could be no real solution. For once such an anti-immigrant ideology gathers momentum, it generates political demands that something be done about the "problem." The wording and enforcement of California's employer sanctions law, also known as the Arnett Law, was in large part a response to this contradiction between the economic and the ideological.

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[2] *Los Angeles Times*, Oct. 22, 1971.

[3] *San Francisco Examiner*, Aug. 25, 1971.

[4] Ray Seeley, press release, Oct. 21, 1971.

[5] Jorge Bustamante, "Commodity Migrants: Structural Analysis of Mexican Immigration to the U.S.," in *Views Across the Border*, ed. Stanley Ross (Albuquerque: Univ. of New Mexico Press, 1978): 187.

At the same time, another contradiction compounded the lawmakers' task. As labor in the agricultural sector was achieving dramatic and visible organizing successes with the United Farm Workers, employers' access to undocumented workers became increasingly crucial to the maintenance of profits. But the visibility and militance which pushed California farmworkers into the national spotlight made it ever more difficult for the California Legislature to ignore the farmworkers' plight. Rechanneling issues of working conditions, strikebreaking, and unemployment into a focus on particular kinds of workers, supporters of the Arnett Law publicized it as legislation aimed at redressing the grievances of resident workers. This redefinition of the issues was eminently compatible with the prevalent anti-immigrant ideology and also served as a crucial first step in "resolving" the two related sets of contradictions.

The legislation as initially formulated attempted to respond to contradictory economic, ideological, and political demands. It was symbolic in that it transmitted a message which reproduced a structure of beliefs concerning the immigrant's role in the economic crisis; and it served symbolically as a public announcement that the California Legislature was sensitive to the concerns of the farmworker. After weaving its way through the amendment process, the bill in its final form was comprised exclusively of these symbolic components. In the process of making the statute acceptable to employers and their representatives, the Legislature deleted those provisions which might have made it an effective threat to employers. From the clash between economic reality, ideology, and political demands evolved a statute which, while retaining its ideological elements, interfered not at all with the economic reality.

In its final form, the Arnett Law simply prohibited employers from *knowingly* employing an alien not entitled to lawful residence in the United States *if* such employment would have an adverse effect on lawful resident workers. The maximum fine for each violation was set at $500. Not only was the "adverse effect" clause left deliberately ambiguous, but the bill included no discussion of identification procedures to establish "lawful residence." Not surprisingly, no employer has ever been convicted under this law, and although the statute remains on the books, the minimal enforcement apparatus has been dismantled.[6]

Ostensibly, the reason for this nonenforcement has to do with legal difficulties. Immediately following the law's passage, the California courts began to question the validity of a state statute which so resembles immigration law -- an exclusively federal domain. Appealed to the U.S. Supreme Court in 1976, the law was declared to be clearly within the state's rightful powers.[7] Nonetheless, the law has, for all practical purposes, been repealed: it is no exaggeration to say that it "disappeared" on its way back from Washington.

A number of clues point to the reason for this disappearance. As Dixon Arnett recalls, "When it was remanded, everybody ran for cover . . . . The Attorney General, at the time considering running for Lieutenant Governor, needed this issue like he needed a hole in the head."[8] Jack Otero, Santa Barbara County Deputy District Attorney, blamed "the politically charged atmosphere" for what he called court "inaction" on the law.[9] One counsel with the Los Angeles Legal Aid Office noted that "the idea is 'let sleeping dogs lie.'"[10]

It would appear that by the time of the Supreme Court decision in 1976 the symbolic functions of the employer sanctions legislation had backfired. Although the immigrant-as-villain ideology regained momentum as California's unemployment rate climbed to 9.2% in 1976, the political utility of the law as a symbol of concern for the worker had dissipated. According to extensive testimony in 1971 and 1972, the law had caused undocumented workers of senior employment status to be laid off and replaced by other illegal aliens at reduced wages. Others were "taxed" $200-$500 by their employers, and some employers apparently used the law as an opportunity to reduce wages, ostensibly to cover the cost of the "risk" involved. Thousands were simply fired.[11] Marches and protests throughout Southern California called attention to the effects of the bill on Mexican-American workers.

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[6] California, Legislature, "A.B. 528," in *Legislative Bills: A.B. 451-575,* 1971, Regular Session, as amended in Assembly, June 30, 1971.

[7] U.S., Supreme Court, *U.S. Law Week* 44 (1976): 4235-39.

[8] Telephone interview with Dixon Arnett, Jan. 5, 1982.

[9] *San Diego Evening Tribune,* Feb. 24, 1977.

[10] Telephone interview, Jan. 12, 1982.

Declared discriminatory and divisive by those very groups to whom it had been directed as a legislative symbol of concern, the ill-fated legislation was hidden away as an embarrassment. The law, the sole potential of which lay in the arena of political utility, had become a political liability. California's employer sanctions law, fought by important economic interests, in practice unenforceable, and now politically embarrassing, disappeared into legal oblivion.

The Simpson-Mazzoli Bill and Employer Sanctions

Two kinds of lessons can be learned from the California experience and applied to the federal employer sanctions proposal embodied in the Simpson-Mazzoli Bill. The first concerns an understanding of the economic, political, and ideological roots of the proposal and its sources of appeal. The second involves the impact of any such provision.

The Simpson-Mazzoli employer sanctions provision, while generally similar to the Arnett Law in California, differs in certain specifics. It is similar in several respects: it specifies that only "knowing" employment of the undocumented is to be sanctioned; it relies for the first three years on easily forged drivers' licenses, Social Security cards, and birth certificates; and it appropriates virtually no funds for enforcement. It differs in that it includes a graduated system of civil and criminal penalties, from a warning on the first offense to a maximum penalty on the fourth offense of one year in prison and a $3,000 fine for each undocumented worker employed. Furthermore, it stipulates that the President set up within three years a "secure" worker-identification system.

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[11] California Legislature, Assembly, Committee on Labor Relations, *Illegal Aliens and Anti-Strikebreaking Legislation: Hearings* (Sacramento, Feb. 1, 1972).

It should not be surprising that the Simpson-Mazzoli employer sanctions proposal achieved a large measure of political success in the 97th Congress. Given the long-lasting and severe economic recession, the highest unemployment rates since the 1930s, and the scapegoating of immigrants as a contributing factor, the symbolic and political advantage of restrictionist policies has reached a new post-World War II pinnacle. At the same time, given the pivotal role of undocumented workers in a number of primary- and secondary-sector industries, Congressional lawmakers are wrestling with the same horns of the same dilemma with which California legislators grappled in 1971. On the one hand, undocumented workers are used ideologically as scapegoats; on the other, their labor is used as a critical component in America's increasingly troubled industries. The outcome is likely to be a symbolic law which, for the moment, "resolves" this dilemma, but which in fact solves nothing. The legislation is likely to be symbolic in two senses: it will serve as a symbolic validation of the immigrant-as-enemy myth;[12] and it will remain a symbolic gesture, addressing political needs, but not altering at all the underlying economic reality.

The law is destined to remain purely symbolic in large part because this focus on the knowing employment of a particular category of worker is inherently problematic in terms of enforcement. In the first place, in the absence of a secure identification system, employers can simply avoid conviction by pleading ignorance of their workers' illegal status. More importantly, however, enforcement officials and courts are unlikely to take seriously an offense which has no apparent victims and which is perpetrated by such clearly "non-criminal" types. In fact, a recent GAO study of twenty nations confirms that in spite of fines of up to $40,000 (as in West Germany), employer sanctions do not work as deterrents, largely because judges do not consider the employment of undocumented workers a serious crime and are reluctant to impose penalties.[13]

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[12] Note, in this regard, the 78-21 Senate victory of the Hayakawa amendment, in which the Senate expressed support for designating English as the official language of the United States. Since the amendment is not binding, it must be interpreted as little more than a condemnation of the influence of immigrants and their culture.

Employer sanctions in the United States will probably not be effective as a deterrent to the employer and hence will not reduce undocumented migration. But this is not to say that they will have no impact. Any approach which is addressed at the kind of worker employed shifts the onus onto the workers themselves. The federal employer sanctions law will not likely reduce the number of undocumented workers, but it will cause the double "criminalization" of undocumented workers. To obtain a job under the new law, the immigrant will not only have to cross the border without papers but also have to present the employers with bogus documents. As a result, these undocumented workers will be even more vulnerable, even more susceptible to implicit or explicit blackmail by their employers. Furthermore, it is predictable that many undocumented workers, and in some cases the documented, will literally have to pay the price for the legislation. In the initial stages, layoffs, wage reductions, and up-front payments at the time of employment will be the price that unknown numbers of workers will pay for the "risk" their employers assume in hiring them.

In spite of these predictable negative consequences for the workers themselves, it must be recognized that it is precisely the "kind of worker" approach which is largely responsible for the political success of proposals like that of Simpson-Mazzoli. This approach earns its political acceptability both because it is compatible with the dominant anti-immigrant ideology and because it is unlikely to have any major impact on economic reality. To underscore the importance of these symbolic components of the legislation, imagine the Congressional response had Simpson led a call to enforce existing protective labor laws — which might be a more effective way to reduce the appeal of undocumented workers.

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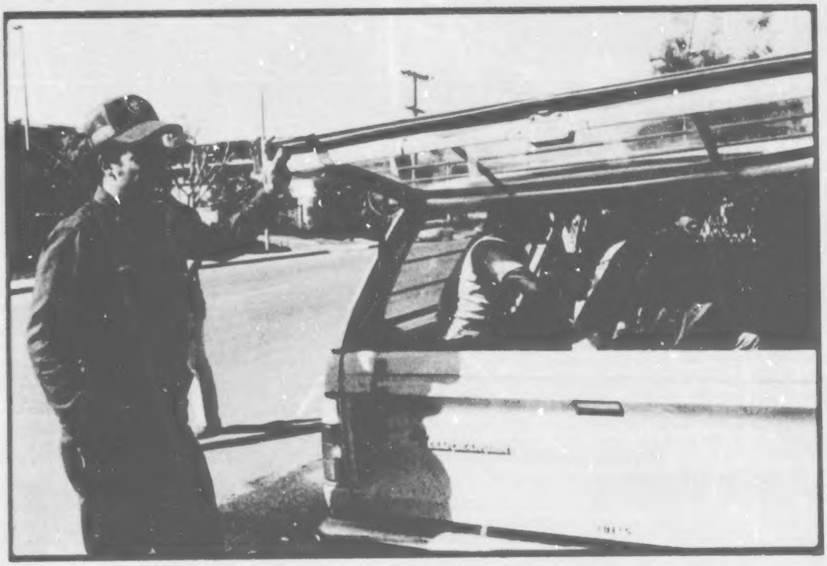
[13] *New York Times*, Sept. 30, 1982.

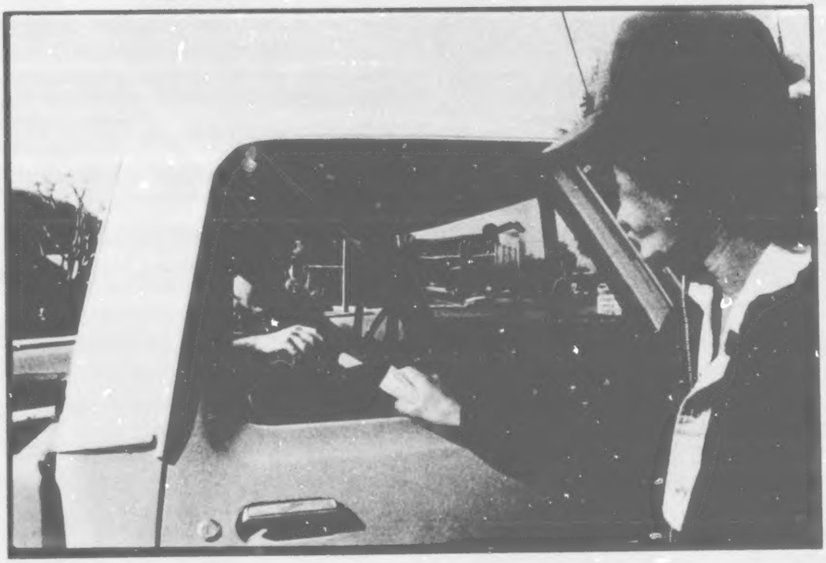
Conclusion

In spite of the failure of employer sanctions to deter undocumented migration in eleven states and twenty nations, the 97th Congress extolled this provision as a breakthrough, and Senator Simpson, its author, as something of a political hero. The preceding analysis has attempted to place this development in a theoretical and historical context and, by referring to the California experience with employer sanctions, to predict its consequences. It has suggested that the proposal is a response to specific economic, ideological, and political contradictions related to the use of immigrants both ideologically and economically. In some ways, the proposal has provided an ideal response to the situation in that it provides political reinforcement of anti-immigrant sentiments while never jeopardizing the economic reality of immigrant employment. Its consequences, however, are likely to be severe for immigrant workers themselves, particularly those of Hispanic origin. The law will compound the vulnerability of the undocumented, and they will literally pay its price.



The INS makes a sweep . . .

. . . and the apprehended workers' employer leaves word with a witness to have his employees call him upon their return from Mexico.



EMPLOYER SANCTIONS LAWS: THE STATE EXPERIENCE AS COMPARED WITH FEDERAL PROPOSALS*

by Carl E. Schwarz
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Introduction

Any serious consideration of recent proposals for an employer sanctions law should include a review of the enforcement experience of the eleven states and one city that have such statutes on the books.[1] This essay will analyze and compare eight of those state statutes[2] as to the content and enforcement of their employer sanctions provisions and will also compare them with the employer sanctions and worker-identification provisions of the Simpson-Mazzoli Bill under consideration by the 98th Congress. The conclusion of this work will consider briefly the experiences of Illinois and New Jersey, states in which sanctions bills failed but which have undertaken intensive efforts to punish employers for violating fair-labor standards and minimum-wage laws in their treatment of alien workers.

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*The author would like to extend his thanks to the staff and fellows of the Center for U.S.-Mexican Studies, where he conducted much of the research for this study. He also expresses his gratitude to the state officials listed in Appendix 2, who generously shared their time and their insights about the problem of employer sanctions legislation.

[1] Beginning with California in 1971, these entities now include the states of Connecticut, Delaware, Florida, Kansas, Maine, Massachusetts, Montana, New Hampshire, Vermont, and Virginia and the city of Las Vegas, Nevada.

[2] It will not include the laws of Delaware, Maine, or New Hampshire.

The central argument of this essay is that the Simpson-Mazzoli Bill's "law-enforcement approach" to the issue of illegal migration is fraught with obstacles; in the long run, it will not solve the "problem." As revealed in the enforcement experience of the eight states here considered, the fatal defects of employer sanctions laws stem from three factors: the inadequacy of administrative capability and commitment; court challenges based on the protection of individual rights; and political resistance by a wide variety of Hispanic, civil rights, and business groups. In considering the several proposals advanced at the federal level over the past decade, government officials have given little attention to the problems encountered by states with similar laws, despite the fact that the experience of the latter covers more than a decade and ranges over a wide variety of demographic, economic, and political circumstances.

The main pattern in all these states is an almost perfectly consistent failure to enforce employer sanctions statutes. Few prosecutions and even fewer convictions appear on the record. California, the first state to enact such a statute, has never convicted an employer under its 12-year-old Labor Code 2805. The few convictions in other states can be listed quickly: Kansas convicted one employer prior to revising its statute in 1978[3] and levied a $250 criminal fine in that case; the Montana Labor Standards Division won two default judgments against the same out-of-state corporation, which decided not to contest the rulings because it would have spent more in legal fees than it lost by paying the $3,200 in assessed damages;[4] and Virginia recorded two convictions in 1981 (out of seven prosecutions during 1979-82), of which one resulted in an $80 fine and a suspended sentence of 30 days in jail, and the other a $55 fine and the same suspended sentence.[5]

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[3] Kansas General Statutes 21-4409 (1978); information on the conviction was obtained through an interview with Mr. Neil Woerman, Special Assistant to the Attorney General, Office of the Attorney General, Topeka, Kansas.

[4] Interview with Paul Van Tricht, Attorney for the Commissioner of Labor and Industry; see also *Department of Labor and Industry* vs. *Forest Development, Inc.* (Judgments of the 18th District Court, Gallatin County, Montana: December, 1982 and January, 1983.)

The reasons for this pattern can be explained partially by the "symbolic law" argument of Professor Kitty Calavita and others.[6] Deriving her framework from the work of Murray Edelman on the "symbolic uses of politics,"[7] Calavita has postulated that symbolic manipulations of law can instill a false consciousness among the public and divert the various political constituencies from the concrete economic and social problems which governments should address directly. Her work further explains that California's employer sanctions statute has never been effectively enforced because of political resistance to it by employer groups, Mexican-American interests, and civil rights organizations — that is to say, because of "dialectical contradictions in the political economy."[8]

Nonenforcement of state sanctions laws can also be attributed to the legal constraints imposed by federal and state courts acting according to an "autonomy model" of judicial decision-making. Rather than reinforcing or legitimating such statutes, the courts have most often enjoined or discouraged executive agencies from administering them, on a wide variety of constitutional and statutory grounds. The latter have included the employment rights of undocumented workers, the lack of proof that employers "knowingly" hired such workers, violation of Fourth Amendment protections against unreasonable search and seizure, and discrimination against aliens "authorized to work" by federal regulations but not necessarily "lawful residents" of the United States. Some decisions have also noted the discriminatory effects of state sanctions laws and INS detentive questioning on legal aliens and citizens who resemble undocumented workers. All these judicial restrictions have been applied in such a way as to inhibit state enforcement practices, in spite of the United States Supreme Court's ruling in *DeCanas* vs. *Bica*[9] that California's sanctions law — and presumably those of other states — represented a legitimate exercise of state legislative authority in the area of immigration.

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[5] Interviews with Leonard Hopkins, Assistant Attorney General, and William Turpin, Department of Labor and Industry, Richmond, Virginia.

[6] Kitty Calavita, "California's 'Employer Sanctions': The Case of the Disappearing Law," Research Report Series, 39 (La Jolla, Calif.: Center for U.S.-Mexican Studies, University of California, San Diego, 1982); see also Professor Calavita's contribution to this volume.

[7] Murray Edelman, *The Symbolic Uses of Politics* (Chicago: University of Illinois Press, 1964). The original analysis of the importance of "sociological representation" is in Gaetano Mosca, *The Ruling Class*, trans. H. D. Kahn (New York: McGraw-Hill, 1939).

[8] Calavita, "California's 'Employer Sanctions'," p. 9.

Penalties and Evidentiary Requirements

All of the laws passed by state and local jurisdictions, as well as the proposed Simpson-Mazzoli Bill, require the prosecutor to prove that an accused employer "knowingly" hired an alien unauthorized to work in the United States. The California and Connecticut statutes define an "unauthorized alien" as one who has not established "legal residency," while the others rest their definition on the failure to produce necessary permits and identification documents issued by the INS, the U.S. Department of Labor, or state authorities.[10] Court decisions in both California and Connecticut have effectively curtailed the requirement of "lawful residence" in those states. *Marin* vs. *Smith*[11] and *Dolores Canning Co.* vs. *Howard*[12] both noted the discriminatory effect of imposing such narrow grounds for worker eligibility on aliens otherwise "authorized to work" by the INS or the Labor Department.

By comparison with the penalties called for by the Simpson-Mazzoli Bill, those imposed on offending employers by the state laws are mild: a range of $100-$500 in civil or criminal fines and from one to six months' imprisonment under local misdemeanor statutes. The Simpson-Mazzoli Bill, in both its House and Senate versions, would establish sanctions which escalate with successive offenses, particularly in the House version, which authorizes penalties on the fourth offense of up to a $3000 criminal fine and/or one year in jail per unauthorized alien hiring.[13]

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[9] 424 U.S. 351 (1976).

[10] See Appendix 1.

[11] 376 F. Supp. 608 D. Conn. (1974).

[12] 115 Cal. Reptr. 435 (1974).

The varying evidentiary requirements for proving the *scienter* of employer intent invite comparison and offer some hard lessons for the proponents of federal employer sanctions. Some laws require an affirmative ("good faith" or "reasonable") effort to check documents to determine worker eligibility at the time of the hire or application; but others merely require a threshold inquiry as to immigration or citizenship status and a document check only upon a negative or doubtful response from the applicant. The standard selected, which turns at the moment of enactment on the issue of political acceptability, has obvious repercussions in terms of effectiveness. Simpson-Mazzoli and the statutes of Connecticut, Virginia, Montana, and Vermont place the more stringent evidentiary burden on the employer; the sanctions laws of California, Massachusetts, Florida and Kansas have the less burdensome (see Appendix 1). The 1981 *Report* of the Select Commission on Immigration and Refugee Policy opted for a similarly light verification requirement for employers in the absence of "a dependable mechanism for determining a potential employee's eligibility."[14]

Both sets of verification requirements produce negative results. The less stringent evidentiary proposals, such as that proposed by the Select Commission, seek to avoid transforming the employer into a surrogate immigration agent and to minimize discrimination against U.S. citizens and legal aliens who share ethnic and/or racial characteristics with undocumented migrants. Even though the Supreme Court has limited challenges to private-sector employment discrimination on the grounds of alienage,[15] a recent *Massachusetts Law Review* article specifically warned its employer-readers about their risking legal sanctions if they discriminated against job applicants on the basis of race, national origin, or ancestry.[16] Several federal court rulings which protect undocumented workers under civil rights statutes and under the National Labor Relations Act reinforce this admonition. But by lightening the evidentiary burden on employers, these laws provide escape hatches which subvert their central purpose: to deter the hiring of illegal aliens by eliminating one of the "pull" factors in the United States economy.

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[13] H.R. 1510, Section 274A (d), 1983 (H.R. 6514 in 1982). For a summary comparison of evidentiary requirements and penalties in the laws under consideration, see Appendix 1.

[14] Select Commission on Immigration and Refugee Policy, *U.S. Immigration Policy and the National Interest* (Washington, D.C.: U.S. Government Printing Office, 1981): Recommendation B-1.

[15] This ruling constrains challenges to such discrimination against aliens when that discrimination is not covered by Title VII of the Civil Rights Act. See *Espinoza* vs. *Farah Manufacturing Co.*, 414 U.S. 86 (1973). But note also *Hicklin* vs. *Orbeck*, 437 U.S. 518 (1978), wherein the Supreme Court struck down Alaska's total ban on private employment of all classes of aliens.

On the other hand, if a law requires that employers prove "good faith" inquiry by looking at specific documentation on mere suspicion that the applicant is an undocumented alien, then it encourages the employer to discriminate against anyone with similar ethnic or racial characteristics. It also converts the employer into a surrogate police or immigration officer, as noted above.[17] Some employers have responded to the dilemma by making their acceptance of employer sanctions in Simpson-Mazzoli contingent on a secure form of worker identification so as to verify eligibility.[18] But Latino and civil rights organizations have countered just as strongly that such an onus on employers and workers would end up blocking Hispanic worker access to the labor market. The Select Commission report of March 1, 1981 reflected these countervailing pressures. The Commissioners agreed on the need for creating an effective verification system, incorporating reliability, the protection of individual rights, and "cost effectiveness." But they could reach no consensus on a

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[16] M. E. Schreiber, "Employment Applications — What Massachusetts Employers Can and Cannot Ask," *Massachusetts Law Review* 69 (1980): 79-80.

[17] Both of these impacts were raised by the state trial court in the *Dolores Canning Co.* case and by the state District Court of Appeals in *Diaz* vs. *Kay-Dix Ranch*, a civil complaint filed against employers based on the "unfair competition" language of the California Civil Code. See Superior Court, Los Angeles County, Memorandum Opinion #016-928 (March 3, 1972); 9 Cal. App. 3rd 588, 595 (1970); and California Civil Code 3369.

[18] Fred Heringer, President of the California Farm Bureau Federation, quoted in "Immigration Plan under Wide Attack," *Los Angeles Times* (July 31, 1981), Part I: 1.

"dependable mechanism" to prove intent to hire illegals.[19] The Simpson-Mazzoli proposal, however, would correct all this confusion. It would require employers to check two standard pieces of identification, and it would require the President to establish, within three years after enactment, a nondestructible and "fraud-resistant" card or number verifiable through a call-in computer bank.[20]

The problem with this hard-line approach is that it would urge the employer to check all worker applicants with Hispanic characteristics simply because Hispanics comprise the largest single group of undocumented aliens in the country. Worthy of note in this regard is the consistent rule of the federal courts in proscribing certain INS searches and detentive questioning of suspected illegal aliens in businesses, highways, and neighborhoods:

> Except at the border and its functional equivalents, officers on roving patrol may stop vehicles only if they are aware of specific, articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that vehicles contain aliens who may be illegally in the country.[21]

In the case *United States vs. Cortez,* the courts ruled that:

> Based upon the whole picture, the detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity.[22]

Finally, and most recently, in *ILGWU* vs. *Sureck:*

> We feel the Fourth Amendment rights of workers would be impermissibly diminished were we to sanction the unconstrained use of warrantless,

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[19] Select Commission on Immigration and Refugee Policy, *U.S. Immigration Policy and the National Interest,* Section B-1: 66.

[20] H.R. 1510, Section 274A (b), 1983 (H.R. 6514 in 1982).

[21] *United States* vs. *Brignoni-Ponce,* 422 U.S. 873, 884 (1975).

[22] 449 U.S. 411, 414-18 (1980).

> detentive questioning of the sort depicted by this record [holding the entire factory work force for selective interrogation] — questioning which is frightening to the workers, intrusive, and often "based on nothing more than inarticulate hunches."[23]

Thus, if the Simpson-Mazzoli Bill transforms the employer into an immigration agent, then he will have a Hobson's Choice. Under-zealous compliance could lead to prosecution. Over-zealousness could produce massive civil rights offenses, including violations of citizens' rights to privacy and due process. At that point a whole new line of case and administrative law could well develop out of complaints of ethnic and racial discrimination filed against employers, instead of against the INS. Interestingly, when the Seventh Circuit Court of Appeals faced a choice between subjecting an employer to prosecution under California's employer sanctions law and upholding the rights of undocumented alien workers to reinstatement and back pay under the National Labor Relations Act (NLRA), it chose the latter.[24] The court held that illegal aliens have a right under the NLRA to vote in a union election, and it ruled further that deportation of those aliens after the election did not invalidate the pro-union results of that election.

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[23] West Bulletin 3054, at 3077 (9th Cir., July 15, 1982). Representative William Dannemeyer (D-California) introduced H.R. 6506 in the 97th Congress (May 27, 1982), which would have amended the Immigration and Nationality Act (8 U.S.C. 1357) to prohibit the INS from entering farms, as well as businesses and residences, without owner consent or judicial search warrants. The INS had relied on *Hester* vs. *United States* (1922) and its "open fields doctrine" to justify warrantless searches. Dannemeyer's bill commanded widespread bipartisan support but lost narrowly in the Judiciary Committee. The U.S. Senate on May 18, 1983 passed a similar proposal under the sponsorship of Senator James McClure (R-Idaho) by a vote of 62 to 33. McClure's amendment was incorporated into the larger immigration reform package passed on the same day.

[24] *NLRA* vs. *Apollo Tire Co.*, 604 F. 2d 1180 (1979).

Enforcement Experiences: Some Lessons

When interviewed about why employer sanctions laws were not enforced, state and local prosecutors in the eight states under consideration most often attributed nonenforcement to judicial rulings — on evidence of employer intent, on potential racial discrimination against job applicants, and on due-process violations during INS raids.[25] Such rulings parallel the experience of the twenty nations with employer sanctions laws studied by the United States General Accounting Office. The GAO found that laws penalizing employers of illegal aliens in each country, some carrying fines and prison terms far more severe even than those proposed in the Simpson-Mazzoli Bill, "were not an effective deterrent to illegal employment."[26] As reasons for this pattern, respondents to the GAO survey most often mentioned judicial unwillingness to impose harsh sentences and case dismissals for inadequate or improper evidence. Federal efforts to fine and imprison farm labor contractors for "knowingly" transporting and recruiting undocumented alien workers have met a similar fate in United States trial courts.[27]

A second major reason for the states' reluctance to prosecute lies in their perception that preventing the employment of illegal aliens is "a low-priority task," to use the words of deputy attorneys-general in Kansas and Connecticut. As a common corollary, many state attorneys feel that the problem of prosecuting employers belongs to someone else, in particular local district attorneys, the INS, or even state legislatures. The latter is most frequently mentioned as the responsible body in states such as California, in which the employer sanctions law has come under court challenge. A final and related reason for nonenforcement mentioned by these attorneys is the relationship among state officials, the INS, and the Federal Justice Department. Some indicated a feeling of frustration with the federal agencies, while others (e.g., those in Florida, Kansas, and Montana) complained of their dependence on these agencies for the data and witnesses needed for successful prosecution. Their opinions on the INS ranged from a judgment that it is "effective but numerically inadequate" as an information provider to feelings that the agency "operates in a separate orbit" and fails to cooperate consistently with local and state prosecutors.

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[25] A list of the state attorneys interviewed for this research is included at the end of this essay as Appendix 2.

[26] GAO, *Information on the Enforcement of Laws Regarding Employment of Aliens in Selected Countries* (Washington, D.C.: GAO Report No. GAO/GGD-82-86, August 31, 1982); note especially the cover letter by William Anderson, Director, p. 2.

[27] J. Vialet, "Penalties for the Employment of Undocumented/Illegal Aliens: The Worker Identification Issue," *Congressional Research Service* (1981): IIIA, notes 22-23; Federal Labor Contractors Registration Act, 7 U.S.C. 2041, *et seq.*

Although only partially applicable to the other state experiences under review, the "symbolic law" theory does seem to explain the sparse enforcement activity behind California's employer sanctions law. Professor Calavita's analysis reveals that passage of Labor Code 2805 in 1971 came as a response to "the immigrant-as-villain ideology" within the context of economic crisis and rising unemployment during the early 1970s. But in the process of making the statute acceptable to employers, the California Legislature deleted the provisions which might have made it an effective deterrent to hiring undocumented aliens.[28] The statute nonetheless came under legal challenge, and the United States Supreme Court ultimately remanded it to the custody of the state in *DeCanas* vs. *Bica*.[29] However, as both organized labor and Mexican-American groups began to express concern over the discriminatory effects of the legislation, the law became a political liability; although it continued on the books, the state made no attempt to enforce it. Neither the State Attorney General's Office nor the Department of Industrial Relations has attempted to appeal the *Dolores Canning Co.* decision of 1974, which voided Labor Code 2805 on the twin grounds of federal preemption and the statute's vagueness about the documentation required to satisfy its "lawful residence" provision.[30] The permissive nature of the *DeCanas* decision and the California Administrative Code's subsequent specific

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28. Calavita, "California's 'Employer Sanctions'," ch. VI.

29. 424 U.S. 351 (1976).

30. 115 Cal. Reptr. 435 (1974).

listing of documents required for determining worker eligibility render the state's failure to appeal all the more curious.[31] Authorities in Sacramento have explained during interviews with the author that "the law has been enjoined; look to the Legislature for the reason why it is not enforceable."[32] These officials were saying, in effect, that nonenforcement has become a political rather than a legal problem.

But one must conclude that the "symbolic law" framework only partially explains the limited enforcement patterns in the other states and in the nations reviewed by the GAO study discussed above. Crowded caseloads and "high crime" priorities within state legal offices, as well as erratic coordinative relationships with the INS, provide another part of the explanation. But the dominant intrusive factor is the behavior of the courts. Given the high visibility of judicial rulings on evidence and on protecting the procedural and employment rights of suspected deportable aliens, one could well attribute the observed reluctance regarding enforcement to the impact of judicial policymaking in its most independent form. The federal and state courts, with some notable exceptions, have assumed an almost oracular role in delimiting or disallowing public policies and INS practices against undocumented aliens and substituting instead those based on constitutional and statutory rights.

These decisions fall into three broad categories. First, a series of federal decisions have stated that the Fourth Amendment prohibits INS agents from detaining and questioning an entire work force unless those agents can articulate reasons for suspecting "that each questioned person is an alien illegally in this country."[33] A more recent Ninth Circuit ruling held that incriminating statements made by suspected illegal aliens after being improperly detained cannot be used as evidence at subsequent deportation hearings.[34] Several other persuasive judicial constraints on employer sanctions enforcement reside in a series of court and National Labor Relations Board decisions which protect a surprising number of rights to employment, fair working conditions, and job-related benefits for undocumented aliens.[35] In the case of *NLRB* vs. *Apollo Tire Co.*, the court ordered reinstatement of the undocumented workers, even though the employer argued that to comply would force him to violate California's employer sanctions law.[36]

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[31] California Administrative Code 16209 (6) (1972).

[32] See Appendix 2.

[33] See *ILGWU* vs. *Sureck* (West Bulletin 9th Cir. U.S.C.A. 3054, 3066, July 15, 1982); also *Blackie's House of Beef* vs. *Castillo*, 467 F. Supp. 1978 (1979), upheld 659 F. 2d 1211 (D.C. Cir. 1981), cert. denied 102 S. Ct. 1432 (1982); *United States* vs. *Brignoni-Ponce*, 422 U.S. 873 (1975); *Loya* vs. *INS*, 583 F. 2d 1110 (9th Cir., 1978); and *Illinois Migrant Council* vs. *Pilliod*, 540 F. 2d 1062 (7th Cir., 1976), modified as to remedy, 548 F. 2d 715 (1977), and 531 F. Supp. 1011 (N.D. Ill., 1982), granting summary judgment and permanent injunction on remand, stating further that "warrants to search premises simply do *not* authorize the seizure of persons found on the premises" (531 F. Supp. at 1020), emphasis added.

Nowhere has judicial autonomy been more striking than in court decisions upholding the rights of the undocumented to a variety of non-employment related government services and benefits. The courts have based these "equal access" grants on the equal-protection clause of the Fourteenth Amendment, on equality rights under state constitutions, and on statutory law. Such grants have made the undocumented eligible to receive state-financed medical services under a Special Needs Act;[37] to secure state benefits for victims of violent crimes;[38] and to have access to divorce courts.[39] More importantly, the U.S. Supreme Court recently invalidated a Texas statute and school district policy which excluded from the public schools any child not "legally admitted" into the United States.[40] Although the Court apparently qualified this decision less than a year later by permitting Texas to charge tuition to children "who have not established a permanent residence,"[41] the former decision still stands along with *Brown* vs. *Board of Education*[42] as a landmark equal-protection case.

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[34] *Sandoval-Sanchez* vs. *INS* (9th Cir. U.S.C.A., April 25, 1983), as reported in *Los Angeles Times* (April 26, 1983), Part I: 1.

[35] See, for example, *Demalherbe* vs. *International Union of Elevator Contractors*, 476 F. Supp. 649 (N.D. Cal., 1979), which invalidated a union agreement restricting employment to citizens only; *NLRB* vs. *Sure-Tan, Inc.*, 583 F. 2d 355 (7th Cir. Ill., 1978), which held that undocumented aliens have the right under the National Labor Relations Act to vote in union elections, that the pro-union results of that election must stand, and that the aliens in question must be reinstated with back pay; *Ayala* vs. *Unemployment Insurance Appeals Board*, 54 Cal. App. 3rd 676 (1976) which reversed state agency denial of disability benefits to undocumented workers; and *NLRB* vs. *Apollo Tire*, discussed immediately below (see note 24).

[36] 604 F. 2d 1180 (9th Cir. Cal., 1979).

[37] See *Perez* vs. *Health and Social Services*, 91 N.M. 334, 573 P. 2d 689 (1978), wherein the New Mexico Supreme Court rejected the state agency's argument that federal immigration authority preempted state assistance to Pérez under the Special Needs Act. The court held that "The agency's argument indicated that Pérez should be shipped out of the country or left here to die. We disagree. [The defendant's] . . . duty to human beings in serious medical condition cannot be thwarted by a misconstruction of the statute or a violation of its regulations" (91 N.M. at 692-93).

In the area of the rights of undocumented aliens, the courts have broadly extended the mantle of special judicial scrutiny for what Justice Harlan Stone in 1938 called a "discrete and insular minority."[43] The courts have thus diverged from their more submissive role of legitimator or "validator" of legislative or administrative policy;[44] any attempt to explain the enforcement patterns of state employer sanctions laws must therefore incorporate this salient, independent propensity of the courts to define and limit what the states — and prospectively, the federal government — can do to deter illegal hiring practices.

Conclusion

Employer sanctions programs and a national identification system are not the only ideas put forth to address the issue of undocumented migration. Some governmental bodies and agencies have proposed that more effective enforcement of existing state and federal laws governing minimum wages and fair labor standards would help deter commercial exploitation of the undocumented underclass while raising no difficulties with prevailing case law. The Select Commission itself recommended "necessary increases in budget, equipment and personnel to allow the Labor Department's Employment Standards Administration . . . to increase efforts to monitor the workplace."[45] The U.S. Civil Rights Commission also urged "vigorous enforcement of the Fair Labor Standards Act" (FLSA) so as to alleviate fears of detection among undocumented workers if they complained of poor working conditions. Effective enforcement of the FLSA thus would "help to ensure that neither citizens or aliens are subject to unfair working conditions."[46] The author's interviews with officials of the California Department of Industrial Relations, particularly the Division for Concentrated Enforcement, indicated that monitoring working conditions with an eye to enforcing state and federal law would be much easier and less costly than finding and punishing employers for hiring undocumented aliens.

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[38] *Cabral* vs. *State Board of Control*, 112 Cal. App. 3rd 1012 (1980).

[39] *Williams* vs. *Williams*, 328 F. Supp. 1380 (D.V.I., 1971).

[40] *Plyler* vs. *Doe* and *Texas* vs. *Certain Named and Unnamed Undocumented Children*, 102 S. Ct. 2382 (1982).

[41] *Martinez* vs. *Bynum*, Sup. Ct. Bull. 81-857 (May 2, 1983).

[42] 347 U.S. 438 (1954).

[43] *United States* vs. *Carolene Products Co.*, 304 U.S. 144, 152, n. [illegible] (1938).

[44] See Howard Ball, *Courts and Politics: The Federal Judicial System* (Englewood Cliffs, N.J.: Prentice-Hall, 1980), ch. 2.

Similarly placed officials in Illinois and New Jersey shared this perspective.[47] Both states had seen intense interest in employer sanctions legislation, but by 1982, two bills in each state's legislature had failed to survive committee mark-up, and Illinois' citizen-preference law on public works employment had also come under challenge in state and federal courts. State-level attorneys of both states therefore directed most of their energy and priorities towards enforcing state laws covering industrial safety, wages, and hours and showed a decided lack of enthusiasm for employer sanctions. During 1981-82, the New Jersey Department of Labor and Industry prosecuted seventy employers for illegal industrial "homework" and secured 30 convictions, with the remainder still pending. In punishing employers for such violations, the Labor

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[45] Select Commission on Immigration and Refugee Policy, *U.S. Immigration Policy and the National Interest*, Recommendation II, B-2: 70.

[46] U.S. Commission on Civil Rights, *The Tarnished Golden Door: Civil Rights Issues in Immigration* (Washington, D.C.: U.S. Government Printing Office, 1980): 59.

[47] See Appendix 2.

Department had secured the "invaluable" cooperation of the International Ladies' Garment Workers' Union, which had targeted many of the estimated 300,000 illegal workers in New Jersey as potential members. Many of the complaints had been filed by shop stewards and other labor leaders in New Jersey.

A law-enforcement approach to stemming the flow of illegal migration to the United States will serve only to create enormous bureaucratic costs, a garrison-state mentality, and widespread threats to the civil rights of both job applicants and employers. Enforcement of fair labor standards, on the other hand, can make the workplace on this side of the border more attractive to native and legal alien workers. It would make many jobs now held by illegal aliens more competitive, and it would deter undocumented migrants from entering the U.S. labor market by reducing the incentive to hire them. This result would be particularly evident in urban commerce, where the FLSA and comparable state statutes apply more rigorously nationwide. Natural deterrence through the competitive forces of the free labor market seems far better than militarizing the border, computerizing the labor force, and making the INS a "hit squad" against U.S. businessmen.

APPENDIX 1
EMPLOYER SANCTIONS LAWS IN EIGHT STATES AND THE SIMPSON-MAZZOLI PROPOSAL

Statute and Provisions	Evidentiary Requirements	Penalty	Residency a Precondition for Work Eligibility?
California Labor Code 2805. States that "No employer shall knowingly employ an alien . . . not entitled to lawful residence in the United States if such employment would have an adverse impact on lawful resident workers."	Requires employer to conduct inquiry on citizenship and, upon negative response, to check documentation, per Administrative Code 16209.	Civil fine of $200-$500. No bar on further civil action.	Yes. Arnett amendment to substitute "authorized to work" rejected, 1972.
Connecticut General Statutes 31-51K (1972).	Requires element of intent in order to prosecute; employer must conduct concurrent inquiry and incurs the burden of checking documentation.	Criminal fine of $500 and 6 months in jail.	Yes.
Kansas 21-4409 (1973; 1978). Prohibits "knowingly employing an alien within the territory of the United States."	*Scienter* — no affirmative burden required.	Criminal Class C misdemeanor; $500 fine and one month in jail.	No.
Massachusetts General Law 149-19C and regulation 3.00, 3.03 (1) (c), 1978, bans "knowingly" hiring an alien "unauthorized to work in the United States."	Requires threshold inquiry as to eligibility at time of hire, not application; a negative response requires check of visa, Social Security card, birth certificate, or Department of Labor or INS cards.	Civil fine of $500.	No.
Virginia Code 40.1-11.1 (1977; 1979). Prohibits anyone "to knowingly employ . . . any alien who cannot provide documents indicating that he or she is legally eligible for employment in the United States."	Places affirmative burden on employer to check work permits and to inquire about citizenship on employment forms (but does not require use of such forms).	Criminal Class I misdemeanor; $500 fine and six months in jail.	No.

Florida Statutes 448-09 (1977). Prohibits intentional hiring of aliens not duly authorized to work.	*Scienter* — no affirmative burden required.	First violation: civil fine of $500; second and successive offences: second-degree misdemeanor, $500 fine and/or sixty days in jail.	No.
Vermont General Law, Title 21-444a (1977). States that "No employer shall knowingly employ . . . an illegal alien." "Illegal" defined as unauthorized to work or having overstayed a visa.	Places on employer an affirmative burden to check INS and/or Department of Labor documents.	First violation: fine of $100-$300; second violation: fine of $300-$750.	No.
Montana Labor Code 39-2-305 (1977). Prohibits anyone from knowingly hiring a person not lawfully authorized to accept employment.	Places on employer an affirmative burden to check documentation.	Civil fine of $300. Authorizes Department of Labor and Industry, which works closely with INS to acquire information regarding concentration of illegal workers, to enjoin further violation.	No.
Simpson-Mazzoli Bill (House version, H.R. 6514, as reported by House Judiciary Committee, September 22, 1982, except where otherwise indicated). Prohibits "knowing employment" of "unauthorized alien" and deletes the "Texas Proviso" of 1952, which exempted "employment practices" from the "harboring" section of the Immigration and Nationality Act (8 U.S.C. 1324).	Requires employer to verify worker eligibility by examining either a U.S. passport or a U.S. birth certificate or Social Security card *and* an alien identification card or a driver's license or a state-issued identification card. Statute calls for "fraud-resistant system" to determine eligibility, to be implemented after three years.	First violation: warning; second offense: civil fine of $1,000 per unauthorized hiring; third: $2,000 civil fine per hiring; fourth: criminal fine of $3,000 or one year in jail per unauthorized hiring. Criminal offense not restricted to "pattern or practice" of violation as with Senate version (S. 2222, 1982). Limits sanctions to businesses which employ four or more employees.	Partly: statute requires employer to check documentation for establishing that worker-applicant is a "legal resident" of the U.S.

APPENDIX 2
LIST OF GOVERNMENT ATTORNEYS AND SENIOR ADMINISTRATORS INTERVIEWED, MAY, 1982 — APRIL, 1983

Florida:

Mr. Chad Motes, Legal Services Department, Department of Labor, Tallahassee

Mr. Zeke Sims, State Employment Service, Tallahassee

Kansas:

Mr. Neil Woerman, Special Assistant to the Attorney General, Office of the Attorney General, Topeka

Mr. Nicholas Tomasic, Deputy District Attorney, Kansas City

Illinois:

Mr. Michael Luke, Assistant Attorney General, Office of the Attorney General, Springfield

New Jersey:

Mr. Don Alten, Deputy Attorney General for Labor and Industry Code Enforcement, Trenton

Mr. William Clark, Assistant Commissioner of Labor, Trenton

California:

Anonymous attorneys with the Office of the Attorney General, Sacramento, and the Division of Concentrated Enforcement, Department of Industrial Relations, Sacramento and Santa Ana

Virginia:

Mr. Leonard Hopkins, Assistant Attorney General, Richmond

Mr. William Turpin, Staff Counsel, Department of Industry and Labor, Richmond

Montana:

Mr. Paul Van Tricht, Assistant Attorney General (for labor-standards enforcement), Helena

Connecticut:

Mr. John McCarthy, Staff Counsel for the Commissioner of Labor's Office, Hartford

Vermont:

Mr. David Lagala, Director, Wage and Hour Division and Child Abuse Section (and of employer sanctions enforcement), Department of Labor and Industry, Montpelier

IMMIGRATION REFORM AND LEGAL RIGHTS: A CRITICAL ANALYSIS OF THE SIMPSON-MAZZOLI BILL

by Barbara K. Strickland
Attorney at Law

This essay provides a critique of the immigration reforms proposed in the Simpson-Mazzoli "Immigration Reform and Control Act of 1982" (S.2222 and H.R. 5872). The Simpson-Mazzoli Bill is one of many proposals which have emerged during the past decade in response to the ineffectiveness of United States immigration law. While the provisions of the Simpson-Mazzoli Bill to legalize undocumented aliens may be somewhat more acceptable than those of previous proposals, the bill as a whole is overly restrictive and punitive and would cause great hardships to United States citizens and immigrants alike. My objections to the bill lie especially in the areas of visa regulation, the effects of the bill on due process, and the workability of the employer sanctions proposal, which lies at the very heart of the legislation.

Visa Regulation

According to the Select Commission on Immigration and Refugee Policy, in 1981 over one million of the persons who qualified for an immigrant visa could not obtain one because of numerical limitations. Unfortunately, the waiting period for a visa has become as long as 15 years, with a 10-year wait not uncommon for Mexicans. In this important area, the United States has abdicated a moral responsibility. The principle being violated can be expressed in simple terms: if a country intends to accept an applicant as an immigrant, it should do so in a reasonable period of time; if it does not intend to accept applicants, it should not hold out a false promise by making them eligible for a visa which in practice they will never receive.

The Simpson-Mazzoli proposal does nothing to address this problem and in some instances will seriously aggravate the backlog. For example, the bill proposes a total of 350,000 family-reunification visas. Assuming that the number of immediate relatives seeking admission does not decrease, the legislation would make available only 218,159 visas for persons applying under the equivalents to the current first, second, fourth, and fifth preferences. At present 236,000 visas are available for these applicants annually. Assuming that the number of immediate relatives does not increase, the processing of all fifth-preference applicants *approved* as of 1981 would take over 24 years.

Applying the Simpson-Mazzoli formulation to individual countries shows how the legislation would magnify the hardship. According to INS Annual Reports, we can expect that at least 16,000 immediate relatives will be admitted from the Philippines. Under Simpson-Mazzoli, only 4,000 visas would remain for all of the remaining categories. Thus, the admission of unmarried sons and daughters would still occur within a year, but clearing the current second-preference backlog would take 7.6 years, and processing the present backlog of fourth-preference applicants would take over 32 years. Unfortunately for those unlucky persons in the fifth-preference classification, processing all of their applications would take over 400 years. These estimates include only the backlog of applicants already approved. If qualified applicants solicit admission at a rate which exceeds the rate at which the backlog can be cleared, then the backlog will grow, as will the delay between approval and admission. If the number of applications from immediate relatives increases, the pool of visas available for the remaining family applicants will decrease, thus exacerbating the problem.

Visa backlogs, moreover, are more serious than a broken promise: prolonged backlogs contribute to illegal entry. Immigrants faced with the choice between several years of separation from their family members and violation of the law will often choose the latter. The extreme differences in the backlog for a particular category from one country to another also contribute to contempt for the law. It has not escaped the notice of the Mexican second-preference applicant, for example, that he or she faces a nine-year wait for admission, while a similarly situated French applicant need wait only a few months.

Furthermore, if the Simpson-Mazzoli proposal becomes law, it will bring immediate relatives — the parents, spouses and minor children of adult U.S. *citizens* — under the numerical limitation for the first time in our history. Under current conditions, the INS may take as long as one year to adjudicate a petition from an immediate relative. The United States consulate may take an additional six months to conduct its investigation. To this already considerable delay, the bill would add the possibility that the applicant be forced to wait for an available visa because his or her country would have exhausted its quota of immigrant visas. Residents of countries which in the past have not suffered from the problem of visa backlogs may begin to experience this difficulty when immediate relatives enter the competition for available visas. In seeking to "control immigration" by bringing immediate relatives under the quota, the bill will only force relatives of U.S. citizens into the dilemma of separation from family members or illegal residence in the United States. However, the situation of immediate relatives will be enviable by comparison with that of other family-immigrant applicants. Indeed, other family-reunification applicants may be entirely preempted from a visa by the inclusion of immediate relatives in the quota. Simpson-Mazzoli will in some preference categories and for some countries make a mockery of our presumed goal of reuniting families.

Adjustment of Status

The Simpson-Mazzoli proposal would allow only those applicants who have been continuously "in status" to adjust their immigrant status and would completely disqualify students, except immediate relatives of legal residents or citizens. Yet often an alien who is "out of status" has become so through no fault of his own. Many aliens apply for changes in or extensions of their status only to have their applications delayed or even lost by the INS. Any attorney dealing in immigration matters can cite incidents in which the INS grants a request for an extension of a non-immigrant visa but does not return the paperwork until after the extension has already expired.

The bill would also require those seeking adjustment of status, all of whom are qualified immigrants, to depart the United States if they wish to return as immigrants. This procedure serves no useful purpose other than to punish the intending immigrant. The case of a young couple who recently came to my office exemplifies the hardship which could result from this restriction. The wife was a student from Greece who while in the United States had met and married a young man, a permanent-resident alien from her own country. Although she was several months pregnant and even though she qualified as an immigrant under both the present law and the proposed bill, the latter would force her to leave the United States, without regard to her condition, without regard to other hardships which may exist, and without regard to the undeniably *bona fide* nature of her marriage and her student status. The law would force her to proceed abroad to receive a rather routine immigrant visa.

No Derivative Eligibility

Under current law, the spouse and minor children of a prospective immigrant who qualifies under one of the preference categories share that level of preference with the qualified applicant. The Simpson-Mazzoli Bill contains no comparable provisions. A prospective immigrant under the new law would be separated from spouse and children if he or she chose to immigrate — a separation which could last for several years because of the visa backlog. In addition to the obvious hardships involved, this oversight in the proposed bill will simply double the amount of work to be done by the INS and the United States consulates. Some informed sources have asserted that the bill's authors did not intend this omission of derivative eligibility. If so, the oversight illustrates that the sponsors of this legislation do not fully understand the immigration process.

Non-Preference Immigrant Visas

The reforms of the labor-certification process proposed by the Simpson-Mazzoli Bill would make labor certification slightly more difficult to obtain by adding a training requirement. Furthermore, the bill would exclude those individuals who would have formerly qualified solely on the basis of having received a university degree, and it would require investors to place at risk a much larger sum in order to qualify as immigrants. The demand for visas in these categories would probably decrease somewhat in the face of these tighter requirements, and the visas made available by this decrease could be allocated to non-preference applicants. However, even if the tighter restrictions make available as many as half of these visas, clearing the current non-preference backlog would still take over eight years.

Moreover, whether or not these non-preference visas would be of any use to the many present non-preference applicants from Mexico is unclear. The Simpson-Mazzoli proposal makes the labor-certification requirement specifically applicable to the non-preference category. However, most Western Hemisphere applicants currently classified as non-preference immigrants originally qualified for an exemption from labor certification by virtue of having made application prior to the Eilsberg amendments in 1977. The bill fails to provide clearly that this exemption should continue; yet the availability of a visa will be meaningless to these applicants if it suddenly becomes contingent on a new labor-certification requirement. Most of these applicants would be unable to meet such a requirement, and to require them to do so *ex post facto* would be unfair.

Within the independent immigrant category, the bill sets no fixed percentages to determine the allocation of visas. Therefore, aliens of exceptional ability could completely pre-empt other independent immigrants. Furthermore, the backlog of applications for family-reunification visas might motivate highly qualified aliens who would ordinarily apply as family members to file applications as independent immigrants instead. These possibilities could mean that many persons who have had non-preference applications pending for several years would in practice have no chance of obtaining an immigrant visa; and the entire system's operation would in such a case give rise to the appearance that our immigration laws cater to the privileged and the wealthy.

Effects on Due Process

Perhaps some of the most troubling aspects of the bill are its arbitrary and punitive provisions. Among this country's most cherished legal traditions is the notion that due process should replace arbitrary decisions. Yet Section 121 of the bill would authorize exclusion without a hearing of any alien who appears to be without documents or without a legal basis for entry. That the alien might be a returning permanent resident who had lost his alien identification card would not matter. That the person might be in fact admissible would not matter. That the supposed alien might in fact be a United States citizen would not even matter, because the person apprehended would have no right to a hearing at which to raise any of these issues. The bill provides aliens with the right to a hearing only if they wish to petition for asylum, but it does not require immigration authorities to advise aliens of even that right.

Several sections of the bill seek to limit or abolish judicial review of administrative decisions, and several congressmen have offered amendments which propose even more drastic limitations. These provisions seem motivated by the perception that appeals and other litigation of administrative decisions have thwarted the administration of our immigration laws. Yet of the millions of aliens who come into contact with the INS during a given year, only a very small fraction are represented by counsel. Of the nearly one million Mexican aliens apprehended each year, only about 20,000 reach deportation hearings. The remainder waive their rights to such hearings, and only a few contest those hearings in any meaningful sense of the word. Only a small percentage of the cases decided by immigration judges are appealed.

In this framework, the contention that the limited opportunities for judicial review serve to thwart the administration of the law seems ridiculous. Judicial review, moreover, allows for the correction of erroneous decisions and serves the purpose of standardizing interpretations and applications of the law in various regions of the country. The suppression of judicial review will give rise to a system in which the rights of an alien in California may become substantially different from those of an alien in New York; or indeed the rights of an alien appearing in front of Judge X may be significantly different from those of a similarly situated alien appearing in the same court in front of Judge Y. Judicial review provides the only meaningful protection against decisions that are arbitrary, capricious, or overly punitive.

The reduction of the time period for filing an appeal of a deportation order from six months to thirty days reveals another misunderstanding of the current process. This provision will not insure the more speedy removal of deportable aliens. Current law does not require that the INS wait six months or any period of time before carrying out this order. The Service can and frequently does move within a much shorter time, and the alien cannot appeal once removed from the country. The 30-day time limitation will encourage attorneys to file appeals in nearly every case in order to preserve the rights of the alien, because the new rule will not allow sufficient time for a careful review of each case — a review which might reveal that an appeal is not warranted.

The Workability of Employer Sanctions

Finally, the provisions of the bill which penalize employers for hiring undocumented workers are objectionable for a number of reasons: they will not work; they will be extremely expensive to administer and enforce; they will subject the undocumented to even greater exploitation; they may result in discrimination against certain ethnic groups in the citizen population; and they create a tremendous potential for abuse.

Effectiveness

No evidence, historical or theoretical, has ever demonstrated that employers and industries which depend on the undocumented can or will recruit domestic workers. Nor have employer sanctions had any demonstrable effect on the employment of undocumented aliens in those states and countries which have enacted such laws. Since the enforcement of employer sanctions laws will necessarily be selective, some employers will undoubtedly find their present practices of recruiting the undocumented more economical than increasing wages and improving working conditions to the point that jobs become attractive to domestic workers.

The schemes by which an employer could attempt to avoid the sanctions are practically endless. They could pay employees on a cash-only basis and upon inquiry deny the existence of such employees. They could have several employees work under a single set of legal documents. Or they could simply show the employee's date of hiring to be a date prior to the enactment of the bill since the sanctions do not apply to present employees.

Costs of Enforcement

Recent research has shown that the majority of the undocumented work for small businesses with few employees. The INS does not have the personnel or resources to investigate these thousands of businesses and prosecute violations at this level. They would be forced to concentrate resources in sporadic and largely ineffective "raids," in much the same way that they now attempt to detect the undocumented. The amount spent per enforcement effort will necessarily be high and the cost in social divisiveness incalculable. The proposal for a national employment identity card, moreover, will create incredible costs. The costs of simply upgrading the Social Security card by including the sex and birthdate of the holder and printing the card on "security" paper has been estimated at $850 million and would require 62,000 staff-years. Since no evidence suggests that undocumented aliens adversely impact our society at anywhere near this level, one wonders whether the cure is worse than the perceived illness.

Exploitation of Aliens

Although it cannot achieve its announced objectives, an employer sanctions law, even if only sporadically enforced, will have an adverse impact on the undocumented. Many of these workers are already exploited by employers who fail to pay minimum wages or force employees to work in unsafe conditions. The risk involved in hiring the undocumented after the enactment of employer sanctions will tempt employers to increase these abuses. They will pay their employees in cash rather than by check, thus making minimum wage violations easier to perpetrate and more difficult to verify. Since they will be keeping no formal payroll records, employers could also deny that they employed individuals who suffered injuries on the job. The increased vulnerability of undocumented workers to their employers' whims will make them even more reluctant to report minimum-wage and health and safety violations, and they will become even less likely to engage in organizational activities and could more easily be used as strikebreakers.

Discrimination against Citizens

Several factors will contribute to a tendency for employer sanctions to increase discrimination against ethnic Americans. First, since the necessity of selective enforcement and a shortage of resources will force the INS to concentrate its enforcement efforts, an employer who hires large numbers of ethnic workers will run a much greater risk of undergoing investigation. Since such investigations will cost the employers time and money, many of them may attempt to avoid even the possibility of an investigation by reducing the number of ethnic workers that they employ. Since employers are seldom in a position to evaluate the authenticity of documents presented by an employee, many will presume ethnic workers to be illegal and therefore to represent a risk. After the passage of California's employer sanctions law, for example, employers laid off large numbers of Hispanic workers.

Employer sanctions will also contribute to discrimination against ethnic Americans by creating a climate of hostility against certain ethnic groups, especially Latinos and Asians. Since INS enforcement priorities overwhelmingly emphasize the Latino and Asian immigrant, they have already created, to a certain extent, the perception that most members of these ethnic groups are "illegal." One sees this hostility demonstrated when people worry about a Hispanic "Quebec" in the United States. The perception that the Latino immigrant is somehow linguistically and culturally unassimilable has already gained wide acceptance, despite studies which show that almost no third-generation Hispanics still use Spanish as their dominant language. By singling out Latinos and Asians as potential problems in the workplace, employer sanctions will in practice increase popular hostility towards all members of these groups.

Danger for Civil Liberties

Finally, employer sanctions and the provision for a national employment identification system create a tremendous potential for the abuse of civil liberties. The existence of such a system will create the temptation to use the identification document for purposes other than determining eligibility for employment, a tendency already manifest in the amendment permitting local police to inquire into immigration status. In recent years, the FBI, IRS, and CIA have abused their powers, and we have no assurance that government agencies will not similarly abuse the employment eligibility card, which would make available an incredible amount of information on any given individual. This response to a perceived problem itself implies much greater risks than does the "problem" which it purports to solve.

Conclusion

In certain respects which I have not discussed here, the Simpson-Mazzoli Bill represents an improvement over previous proposals to reform our immigration laws. The shortsightedness of the proposal, however, will create new problems even more severe than those we now face. The threats posed by the bill — to the basic fairness of our immigration system, to the judicial principles of due process, and to our very civil rights — are too great to ignore.

LEGAL DILEMMAS IN THE AMNESTY PROVISIONS OF THE SIMPSON-MAZZOLI BILL

by Thomas Heller
and Robert A. Olson
Stanford Law School

Title III of the Immigration Reform and Control Act of 1982[1] would have opened the door for the legalization of certain aliens unlawfully present in the United States by adding a new section (245A) to the Immigration and Nationality Act. The proposed new section would allow the Attorney General, "in his discretion and under such regulations as he shall prescribe," to adjust the status of certain illegal aliens to that of permanent residency or to a newly created status of temporary residency. This latter category itself might potentially lead to permanent residency. While section 245A defined some of the conditions of eligibility for adjustment of status, the Attorney General might still require, under his discretion and regulatory power, supplementary eligibility criteria, evidentiary rules, guidelines for the exercise of discretion, or application procedures. This essay examines the extent to which the bill might require that the Attorney General formulate any such standards through a rulemaking proceeding; second, it explores the question of whether such a rulemaking would be required to comply with the procedural requirements of the Administrative Procedures Act.[2]

The proposed section 245A sets forth several discrete eligibility requirements for undocumented persons who wish to legalize their status. The bill would allow the

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[1] Hereinafter Simpson-Mazzoli.

[2] U.S.C. Section 551 *et seq.*

Attorney General to adjust the status of an alien to that of permanent residency only if that alien has unlawfully and continuously resided in the United States since January 1, 1977. Similarly, an alien would qualify for an adjustment of status to the newly created category of temporary residency only if he or she entered the United States before January 1980 and continuously and unlawfully resided in the United States since that time. Both the permanent and the temporary residency provisions require that to qualify for amnesty, an alien who entered the U.S. under a non-immigrant visa must have either overstayed that visa or have been known to the U.S. Government to be in violation of the visa's terms prior to the applicable date.

In addition to these residency criteria, the statute specifically requires that the alien apply for adjustment promptly, not have been convicted of a felony or three or more misdemeanors in the United States, not have participated in racial, social, religious or political persecution, and be otherwise admissible as an immigrant to the United States. Regarding the alien's admissibility as an immigrant, the bill would waive the requirements pertaining to proper entry and documentation, literacy, graduation from unaccredited medical schools and, most importantly, labor certification. The provisions of section 245A would also allow the Attorney General to waive all other requirements for admission except those relating to commission of multiple crimes, crimes of moral turpitude, narcotics violations (other than a single offense of simple possession of 30 grams or less of marijuana), potential subversive activity, and participation in Nazi persecutions.

While section 245A sets forth these fairly detailed statutory requirements, the bill would not automatically entitle an alien fulfilling all of these criteria to an adjustment of status. Under Simpson-Mazzoli, such adjustment would fall entirely within the discretion of the Attorney General, who nonetheless cannot lawfully exercise this discretion in an arbitrary manner.[3] Consequently, Simpson-Mazzoli would require that the Attorney General resolve such issues as instituting the formal procedures for application; imposing additional conditions, if any, for eligibility; establishing methods for applying the statutory provisions; setting standards to follow in the exercise of discretion; and determining what evidence will be necessary or sufficient to prove various claims. Such determinations would have great practical significance: they would affect decisions by the INS as to who shall obtain permanent or temporary residency, as well as decisions by individual undocumented persons regarding whether or not to risk exposure and deportation by applying for legalization under section 245A.

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[3] See *Foti* vs. *INS*, 375 U.S. 217, 228-230 (1963); and *Hintopoulos* vs. *Shaughnessy*, 353 U.S. 72, 77 (1957).

In formulating these and similar guidelines the Attorney General theoretically would have several procedural options. On the one hand, he might proceed by way of case-by-case determinations, announcing generally applicable standards as they are needed to resolve individual controversies. Alternatively, the Attorney General might issue detailed regulations which set forth, to the degree that issues can possibly be foreseen, precise general rules to be applied to individual circumstances. In addition to the substantive impact of these decisions, the *procedure* selected by or imposed upon the Attorney General will have significant effects. The choice of procedure will affect the amount of community input, the level of confidence in the predictability of the system, and ultimately the number of the undocumented who choose to apply for legalization. Most importantly, full rulemaking under the Administrative Procedures Act requires notice in the *Federal Register* of the proposed rule; an opportunity for interested persons to submit written comments; consideration of these comments; and a statement of the basis and purpose of the rule before it can become effective.[4]

Because the process of setting a rule allows for public commentary, a general rulemaking is much more likely to reflect special knowledge about the realities of the situation of illegal immigrants. The many community groups which possess such knowledge represent undocumented workers, minority permanent residents and citizens, and labor or voluntary agencies; they could contribute both their expertise and their particular views and concerns to the rulemaking process, especially if they are given standing to communicate their positions to the

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[4] 5 U.S.C. Section 553 (b), (d). See also 5 U.S.C. Section 552, which requires publication of all rules in the *Federal Register*.

Attorney General prior to issuance of the regulations. Even disregarding such formal channels of communication, the Attorney General when acting in a rulemaking capacity would more likely take account of general effects and balance the impacts of several factors than if he had to decide only one narrow issue. Second, a rulemaking procedure would be more certain and, importantly (given the short statutory framework), more immediately predictable. A general regulation could cover all of the salient considerations from the start. A case-by-case approach would postpone consideration of some major issues and would leave the entire system open to significant revision in terms of expected chances of a favorable decision. Moreover, regulations could become effective upon promulgation; the results of adjudication would have to await hearings and appeals.

Both of these factors, community input and predictability, would tend to shape the degree to which undocumented persons attempt to take advantage of the legalization program. The greater the community input, the more likely that the standards generated would conform to the concerns and practical situations of presently undocumented persons. Second, the more predictable the system, the more an alien could judge his or her chances of obtaining adjustment of status. Under such a system, many more undocumented persons would risk exposure and possible deportation by applying for adjustment of status. This argument does not assert that a case-by-case approach has no advantages. The method is particularly well suited to deal with unique and varying individual circumstances and novel and unforeseeable problems.[5] Nevertheless, an adjudicatory approach would probably result in lower levels of participation in the program.

As a consequence, those who will represent the interests of undocumented persons may have to confront the question of whether they may legally force the Immigration and Naturalization Service (INS) to behave as a quasi-legislature through prospective rulemaking or as a quasi-judiciary through case-by-case adjudication. This question raises several distinct legal issues which are quite unsettled at the present time. The most important of these issues concern whether the choice between rulemaking and adjudication is purely a matter of choice for the administrative agency or whether the general nature of the problem or the specific language of the statute may compel the agency to adopt a particular mode of proceeding. Furthermore, if the INS chooses or is forced to promulgate rules, we may inquire whether the agency can be compelled to go through proceedings involving public notice and comment prior to the adoption of valid regulations.[6]

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[5] See *SEC vs. Chenery*, 332 U.S. 194, 202-203 (1947); and *NLRB vs. Bell Aerospace*, 416 U.S. 267, 294 (1974).

The problem of remedies also deserves mention. Regulations which result from a procedurally defective process are null and void and will be invalidated by the courts.[7] As a result an individual successfully challenging a rule on procedural grounds will be put in the same position that he or she would have been in if that rule had never existed. Courts will not speculate on what the regulation would have been had individuals been given the notice and opportunity to comment; thus invalidation of a rule will not necessarily mean that the challenger will achieve his or her ultimate goal. If the challenged regulation merely poses an obstacle prior to the exercise of otherwise valid discretionary powers, then the court will remand the individual's case for a determination of the applicability of additional criteria and the appropriateness of discretionary action.[8] A more difficult problem is posed when the challenged regulation provides not an obstacle, but rather the means with which to bestow an otherwise unavailable benefit. In such instances the "remedy" appears to do no more than to hold the individual's claim in abeyance until the agency can validly promulgate substantive standards.

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[6] Interestingly, the answers given to courts in response to key questions about administrative behavior in the immigration sector reveal substantial disparities which seem to follow regional lines. The rulings which impose greater restrictions on agency discretion tend to cluster in the Ninth Judicial Circuit in California. This tendency may have some tactical implications for the location of lawsuits regarding the implementation of Simpson-Mazzoli.

[7] See, for example, *NRDC* vs. *EPA*, 683 F2d at 767; and *Sannon*, 460 F. Supp. at 468.

[8] See *Lewis-Mota*, 469 F2d 478, in which the case was remanded to determine whether the applicants were "otherwise admissible"; in *Patel* 638 F2d 1199, *Ruangswang*, 591 F2d 39, and *Hou Ching Chow*, 362 F. Supp. 1268, the cases were remanded for exercise of discretion; but in *United States ex rel. Parco*, 426 F. Supp 976, the plaintiff was granted a stay of voluntary departure when the District Director stipulated that the challenged policy was the sole reason for denial.

The regulatory structure set up under the legalization provisions of Simpson-Mazzoli could take the form of routine adjustments of status, unless the applicant falls within certain enumerated exceptions; but it could also set guidelines which specify when, as a matter of grace, adjustment of status should be granted; or it could do both. An applicant who turns himself or herself in as an illegal alien to apply for legalization would face continued uncertainty if she or he successfully challenged either type of regulatory scheme. An alien who successfully challenges an exception will likely still face a discretionary decision by the INS which is subject to review only for arbitrariness. Two likely outcomes of the law's regulatory scheme are even more discouraging. A successful challenge to guides on discretion will probably only buy time while the agency properly repromulgates its standards; and the chances are slim that the agency would make favorable changes in response to public comments. Nevertheless, faced with the prospect of losing employment as a result of a national employer sanctions law, an alien might yet be persuaded to petition for legalization and then challenge the regulations applied in the case if the agency initially denies the request for adjustment of status.

In summary, the legalization provisions of Title III of Simpson-Mazzoli rely to a great degree on the actions of the Attorney General to give them form and effect. In the event of Simpson-Mazzoli's enactment, the Attorney General would very likely be constrained to make a number of the crucial implementation decisions through a rulemaking proceeding rather than by adjudication because of the general applicability of such regulations and the severity of the sanctions they enforce. Furthermore, the procedural requirements of the Administrative Procedures Act may apply to these rulemakings. The technically non-binding nature of some of the regulations and the exigencies of short deadlines may, however, allow the Attorney General to disregard such requirements. One can address the problem only in terms of probabilities and possibilities because the law in these areas is at times muddled and at other times plainly conflicting. The possibilities for procedural challenges to substantive regulations should be addressed by the Justice Department, community groups, and disappointed applicants.

No Entry
No Entre

SIMPSON-MAZZOLI: IMPLICATIONS FOR THE LATINO COMMUNITY

by Frank del Olmo
Los Angeles Times

"Why do you Chicanos defend illegal aliens?" the letter asked. "They probably hurt you more than anyone else." I have been receiving letters and phone calls expressing similar sentiments for years. The question is often asked by persons who are sympathetic to Latino problems. Sometimes it is even asked by Latinos.

It is a question worth pondering these days, as Congress prepares to enact some of the most drastic changes made in U.S. immigration laws in a generation. The proposed legislation, named the Immigration Reform and Control Act, is better known as the Simpson-Mazzoli Bill, after its coauthors, and will likely be enacted by the 98th Congress. President Reagan has already indicated that when it passes, he will sign it into law. The reason for this consensus on immigration reform is that most U.S. citizens are convinced that immigration to this country is out of control and must be stopped.

No ethnic group in this nation of immigrants has questioned that concern about illegal immigration in the way that Mexican-Americans have. Although not all Latinos are opposed to immigration reform, the most vociferous opposition to the Simpson-Mazzoli Bill has come from Latino organizations; they have expended a lot of their limited political clout in fighting it. It is ironic that Latinos would put so much effort into such a campaign, because a good argument can be made that if Simpson-Mazzoli is enacted, it would have only a minimal effect on Latino citizens.

The section of the bill most strongly opposed by Latino lobbyists is the provision calling for penalties against employers who hire undocumented workers.

Organizations like the Mexican-American Legal Defense and Education Fund believe that employer sanctions will give racist employers an excuse to discriminate against Latinos. They fear that even well-meaning employers may turn Latino job applicants away rather than risk hiring someone who looks or sounds foreign. But as firmly as some Latinos believe that argument, there is no definitive proof that the bill would result in discrimination as a side-effect. None of the studies of employer sanctions laws in other countries and in eleven states of this country have noted any discriminatory side-effects. (Much to the chagrin of advocates of employer sanctions, those studies also found that such laws had little effect in discouraging the employment of illegal immigrants — but that is another issue.)

Another section of the bill that concerns Latinos is the so-called "amnesty" provision. This would permit illegal immigrants who have lived continuously in the United States since 1977 to legalize their status and remain in this country. An amnesty would be a generous and positive step towards resolving the status of people who came to this country before 1977, but it would do little to clarify the status of those who entered after that date and nothing at all for the many foreigners who will inevitably enter this country in the future.

Again, while one can argue the merits of an amnesty program, there are indications that it would have only a minimal effect on Latino immigrants. Take the case of Mexican workers, for example. Although they receive an inordinate amount of public attention, only about half of the illegal immigrants in this country come from Mexico. And unlike foreigners from farther away, most Mexicans are migrants rather than immigrants. They come to this country long enough to earn money, then return to Mexico. Few would want to stay here, even if given the chance through an amnesty.

Finally, some Latinos are fearful that the Simpson-Mazzoli Bill will lead to an increase in the budget and manpower for *la migra* — the Immigration and Naturalization Service and its uniformed arm, the Border Patrol. The two agencies have long been feared and detested by Latinos because of their past history of indiscriminate raids in Latino neighborhoods.

But there is no money in Simpson-Mazzoli for the immigration service — just a few nice words about the sense of Congress that the agency needs more money and manpower.* Unless Congress does more than talk about giving the INS more money, it will continue to be the most inefficient agency in the federal bureaucracy, so overworked and underfunded that it can barely keep up with its daily paperwork. Any Latino who looks carefully will soon realize that *la migra* is simply not the dreaded force that he grew up learning to fear.

So we return to the original question: Why are so many Latino activists concerned about the Simpson-Mazzoli Bill? There are still reasons.

Some think about the bill's impact in highly personal terms. They remember friends or relatives still living in Mexico or elsewhere in Latin America, whose chance to come someday to this country may be adversely affected by the provisions of the bill that limit even legal immigration. The Simpson-Mazzoli Bill for the first time places an absolute numerical limit on the number of immigrant visas that can be issued each year. Even if they do not know anyone who would be personally affected by this provision, Latinos remember that their own parents or grandparents were immigrants to this country not that long ago — and they feel sympathy for other people like themselves.

Some Latinos see all the concern about illegal aliens as a cynical political attack on a powerless group of people. They argue that U.S. politicians are using illegal immigrants as scapegoats for social and economic problems, like unemployment or crime, which they are unwilling or unable to solve.

Other Latinos worry about those provisions of the bill that also preoccupy groups like the American Civil Liberties Union, such as the section that mandates the creation of a national worker-identification system and the provi-

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*During April, 1983, the Immigration Subcommittees of both the House and the Senate wrote into the bill an allocation of funds for enforcement. In the House, this amendment took the form of additional funds earmarked for the INS, while the Senate Subcommittee proposed an allocation of $200 million specifically for implementation of Simpson-Mazzoli — *editors' note.*

sions that limit the right of would-be refugees to seek political asylum in the United States.

Finally, some Latinos are highly nationalistic and resent the Simpson-Mazzoli Bill simply because they see it as anti-Latino. They are convinced that it is the result of Anglo hostility toward Latin Americans, who have increased their influence in U.S. society as their numbers grow.

My opposition to the Simpson-Mazzoli Bill centers on the fact that it won't work. While it represents a consensus of both liberal and conservative "solutions" to the "illegal alien problem," it will not solve the "problem," only exacerbate it. The movement of people from areas of labor scarcity (like Mexico) to areas of labor need (like the farms and some urban areas of the United States) is a natural phenomenon. Along the traditionally open border between Mexico and the United States, that movement is also an historic phenomenon that responds to economic and cultural forces beyond the power of government to control. By trying to stop this movement, all the Simpson-Mazzoli Bill will do is to drive a legitimate economic demand even further underground, making the undocumented workers involved even more confused and fearful than they are now — and thus more exploitable.

The exploitation of illegal immigrants, whether by unscrupulous employers, crooked immigration counselors or slum-lords, is the real problem. That could be ended if some way were found to bring the migratory movement of foreign labor out into the open — in other words, to legalize it. Several specialists have suggested that a government-run guest-worker program would be the best way to regulate the flow. An easier way may be to let U.S. labor unions freely organize among immigrant workers, so that they can then collectively bargain for themselves and protect themselves.

The well-intentioned framers of the Simpson-Mazzoli Bill will eventually realize the futility of trying to halt this migratory flow. Perhaps then Congress will start looking for ways to live with the phenomenon rather than trying to overcome it.

THE TEMPORARY WORKERS PROVISIONS OF THE SIMPSON-MAZZOLI BILL: IMPLICATIONS FOR THE STATE OF FLORIDA*

by Terry L. McCoy
University of Florida

Current Policy

The use of temporary foreign labor in the United States is currently governed by section H-2 of the 1952 Immigration and Nationality Act and by administrative regulations developed by the Department of Labor (DOL). This combination of statute and regulation severely restricts the flow of foreign workers legally entering the country. This policy contrasts with earlier post-World War II programs which authorized the temporary employment of several hundred thousand workers per year. During the 1942-1964 period, the Bracero Program with Mexico was the source of most temporary foreign labor, but a contract labor program with the West Indies also brought farmworkers to Florida.

With formal termination of the Bracero Program, the H-2 section remained as the only means for legally admitting foreign contract laborers to the U.S. The DOL, responsible for regulating admissions under H-2, has increasingly interpreted the statute's provisions as a charge to protect the interests of domestic workers. In practice the Department will not approve the admission of alien labor unless the petitioner can convincingly demonstrate that no U.S. workers are available for the work in question and that the admission of foreign workers will not adversely affect domestic workers employed in related activities. The principal instruments for implementing these guidelines are the requirements that employers conduct an exhaustive effort to recruit domestic workers and that the DOL set wages ("adverse-effect wage rates") and working conditions. The H-2 regulations and the rigor with which the DOL has enforced them have kept the number of legal temporary workers under 20,000 per year since 1975.

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*This essay analyzes the possible effects on the State of Florida of changes proposed in the federal provisions regulating the use of temporary foreign workers. It is part of the joint Florida International University/University of Florida STAR project (DSRT #81-66, 81-67), "The Impact of Refugees/Immigrants on State Services." In the project, it falls in the section titled "Policy Issues: Existing and Proposed Federal Policies on Immigration and Refugees." The objective of the presentations in this section is to review and preview federal policies that affect the flow of immigrants and refugees into Florida and their use of state services.

The Florida sugar industry, consistently the largest single user of H-2 labor, provides an example of the effects of temporary-worker policy as currently constituted. The 8,500 West Indian workers annually admitted for five to six months to cut Florida's sugar cane make virtually no use of public services. They enter the country under contract to a specific employer who must, under the terms of the contract, provide each worker with free housing, transportation and subsidized board. Workers also receive medical insurance and coverage under workers' compensation in the case of injury. Perhaps most significantly, DOL regulations assure each participant work and a minimum wage.[1] They therefore cannot possibly become unemployed while in Florida, where in any case they would not qualify for unemployment compensation. To discourage workers from abandoning their jobs in sugar and seeking employment elsewhere (which is forbidden by H-2 regulations), they are bonded and subject to summary return home in the event of poor performance or serious misbehavior, and 23 percent of their wages are withheld to be collected back in the islands at the end of the season. As a result, relatively few workers desert their jobs to become illegal aliens.[2]

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1. U.S. Department of Labor, Employment and Training Administration, "Temporary Employment of Alien Agricultural and Logging Workers in the U.S.: Labor Certification Process," *Federal Register*, part VIII (Mar. 10, 1978): 10306-10318.

2. Terry L. McCoy and Charles H. Wood, "Caribbean Workers in the Florida Sugar Cane Industry," Occasional Paper No. 2 (Gainesville, Fla.: Center for Latin American Studies, University of Florida, 1982).

The H-2 program currently constitutes little direct drain on state resources. The only state service involved in the program is the Employment Service, which cooperates with the DOL in the certification process. Even indirect costs appear minimal. Aside from selected incidents of protest in which local law-enforcement officials are called on to intervene, the workers are orderly, hardworking (as might be expected given the regulations and conditions governing their presence in the U.S.), and largely confined to the camps. Employers contend that no U.S. workers are available to harvest Florida's sugar crop, and the certification effort would appear to substantiate this contention, although migrant worker advocate groups claim that the employers systematically discriminate against domestic workers. If the employers are correct, then the program displaces no domestic workers who would then turn to public assistance. The rate of unemployment among farmworkers in the sugar-producing area is quite high, especially following the influx of Haitian refugees, but whether, and under what conditions, these same unemployed would cut cane is another question. Up to this point the U.S. Department of Labor has agreed that they will not.

In summary, current federal policy effectively limits the number of foreign workers who legally enter the U.S. for temporary employment. Florida, the state with the largest number of temporary foreign workers, has experienced little drain on its public services as a result of their presence.

The Reagan Guest-Worker Proposal

In October 1981, President Ronald Reagan submitted to Congress his proposal to reform the Immigration and Nationality Act. Previous administrations had likewise formally proposed comprehensive revision of existing policy, but Reagan's proposal followed the report of the Select Commision on Immigration and Refugee Policy and the sudden influx of Cuban and Haitian refugees in 1980. This time, conditions seemingly would stimulate Congressional action.

Two provisions of the Reagan proposal directly addressed temporary-worker policy. Title VI of his bill called for the establishment of an experimental two-year program which would admit 50,000 Mexican guest workers per year, a measure which President Reagan justified in these words: "We must . . . recognize that both the United States and Mexico have historically benefited from the employment of Mexicans in the United States. A number of our states have special labor needs and we should take these into account." Reagan also argued that the provision would deter illegal migration by providing a legal alternative and that the program could be altered or abolished if it did not work.

The Reagan proposal envisioned a program by states. To qualify for temporary foreign workers, a state would have to submit to the DOL an annual certification of need which specified requirements for Mexican labor by area. Employers would then apply for workers through their state's governor. Approved applications would be processed by U.S. consular offices in Mexico, which would issue temporary work visas for up to one year. Once in the United States, the Mexican guest worker could change employment, but only if a new employer submitted a request and the new job was in an approved state and an approved occupation.[3]

The proposal explicitly guarded against allowing the temporary worker to become a public charge. First, violation of the terms of admission would result in deportation and ineligibility for future participation in the program. Second, participants could not have their immigration status adjusted. Third, the bill would prohibit guest workers from bringing any dependents. Fourth, although required to pay taxes, they could neither receive unemployment compensation nor qualify for a wide range of federal welfare programs.

The other provision of the Reagan immigration reform bill which addressed temporary-worker policy proposed that the existing H-2 temporary-worker program continue to exist along with the Mexican guest-worker program.[4] However, for a variety of reasons the latter ran into consid-

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3. Arlene S. Kanter et al., "The Omnibus Immigration Control Act of 1981" (Washington, D.C.: Institute for Public Representation, n.d.): 68-80.

4. Ibid., pp. 100-103.

erable and widespread opposition; consequently, current legislative proposals contain no formal guest-worker provisions.

H-2 Provisions in Simpson-Mazzoli

Early in the current legislative round of immigration reform, the measure jointly authored and sponsored by Senator Simpson of Wyoming and Congressman Mazzoli of Kentucky was substituted for that of the Reagan administration. Although similar in many respects to Reagan's proposal, the Simpson and Mazzoli bills focus their proposals regarding temporary workers on revision of the existing H-2 program.

As originally introduced in 1982, the Simpson-Mazzoli Bill would have converted into statute the administrative rules which the DOL had developed to operate the H-2 program in the years following the termination of the Bracero Program. In committee, however, legislators sympathetic to employer interests succeeded in incorporating other changes which could open up the flow of legal temporary labor through the H-2 channel should other provisions in the proposed legislation effectively cut off the supply of undocumented workers. The Senate rejected an amendment (introduced by Senator Hayakawa) that would have included a large-scale guest-worker program in the bill as well as one (sponsored by Senator Kennedy) that would have retained the H-2 program as it is. The bill that ultimately passed the Senate, however, contained several provisions which could conceivably have affected the number and type of H-2 workers entering the U.S. for temporary employment, and it could ultimately result in a greatly expanded temporary-worker program.

- The Senate-passed bill would have greatly restricted the role of the DOL in the certification process. As originally introduced, the Simpson-Mazzoli Bill would have converted DOL certification from its current advisory status to a mandatory requirement. Eliminating this requirement, as the Senate did, would allow for the possibility that the INS, an agency less sensitive to domestic labor conditions, ignore or overrule DOL recommendations. It would also give rise to the possibility that the Department of Agriculture gain a greater role in the process. Furthermore, the original Simpson-Mazzoli Bill designated part of the revenue from employers' fees to monitoring compliance with regulations, and it established an annual fund of $10 million to assist the DOL in recruiting domestic workers and monitoring treatment of guest workers. The Senate version deleted both, further diluting the role of the DOL in the temporary-worker program, and it transferred final rulemaking authority from the DOL to the Attorney General.

- The bill would have reduced the geographic scope required of employers in their attempts to determine the availability of domestic workers. In order to qualify for H-2 certification, employers would have needed to recruit domestic workers only within their region rather than throughout the country. Given the migratory nature of the domestic work force, it seems reasonable to conclude that a regional labor search would not reach all of the domestic workers potentially available. The test of possible adverse effects on wages and working conditions engendered by the program would therefore be regional rather than national. Moreover, the Senate measure would have reduced the sanctions imposed on employers who violate the terms of certification or of employing temporary workers.

- The proposal would have permitted certification of a labor shortage even when domestic workers wanted to work but would not accept the terms of employment offered. This provision would have given employers more control over wages and working conditions, thus lowering current standards for determining the availability of domestic workers. Furthermore, the proposal would have eliminated the requirement that employers hire domestic workers who apply for work at any time during the first half of the harvest season, as they now must do. Instead, this obligation would terminate at the point that H-2 workers departed for the U.S., and such workers could remain in the U.S. for eleven months in any calendar year, rather than the eight months specified by the original Simpson-Mazzoli Bill.

- Finally, and perhaps most importantly, the measure would have allowed grower associations to act as sole employers and to seek certification for more than one crop. This provision represents a radical departure from current DOL practices, which limit certification to one crop. It would have given employers more flexibility in the use of temporary foreign labor by permitting them to shift their H-2 workers from one crop to another and by centralizing the recruitment and certification processing in producer associations, such as the Florida Fruit and Vegetable Association, which represents employers in a variety of crops.

Potential Impacts

Any analysis of the effects of the proposed immigration reforms must take into account the complex and multifaceted nature that they will have. The proposed changes in immigration would, in the first place, affect different sectors in different ways. To the extent that the temporary-labor provisions would assure an inexpensive and dependable labor supply, Florida's agriculturalists and consumers would benefit. The same provisions, however, would probably drive other Floridians out of the labor market. Secondly, the range of issues addressed by the reform bill extend far beyond modifying the H-2 program. The provisions in the bill which address these issues could conceivably affect the availability and need for foreign workers. Florida's agricultural producers who employ seasonal labor maintain, for example, that they would need an expanded H-2 program to help compensate for the loss of undocumented workers resulting from implementation of the employer sanctions section of

Simpson-Mazzoli.[5] Groups representing organized labor and farmworkers hold the opinion that, given the current high rate of unemployment and the influx of Haitians, the supply of domestic workers and eligible refugees would be adequate to replace the current supply of undocumented foreigners.

The forthcoming analysis will not evaluate any of the above positions, but the complex and interrelated nature of these factors, which might affect the impact of temporary workers on state services, should be kept in mind.

Possible Direct and Indirect Effects

Advocates on both sides of the issue agree that the Senate-passed revisions in the H-2 regulations would result in the increased utilization of temporary foreign workers, especially in American agriculture. It would seem safe to conclude that enactment of the Senate package would eventually lead in Florida to the use of considerable numbers of H-2 workers in agricultural activities other than the sugar harvest, most likely in the production of citrus and vegetables. How would such a development affect demand for state services?

If we accept the premises of the employers, the change would have little impact, if any; they believe that no significant numbers of domestic workers would be willing to replace the undocumented aliens forced out of the labor force by the threat of sanctions against users of such labor. In such a case, legal foreign workers would replace illegal ones. Assuming that relevant regulations remain unchanged despite the Senate's proposals, there is no reason to expect that an expanded temporary labor force would make proportionally greater *direct* demands on state services than does the current program. That is, future H-2 workers would not qualify for any state benefit programs, and the law would continue to require that their employers provide for their health and welfare during the period of their employment in Florida. The requirement that they return home during the off-season and the current incentives to do so would remain operative. The only state service significantly affected would still be the Employment Service.

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[5] See, for example, the testimony of George Sorn, Manager of the Labor Division of the Florida Fruit and Vegetable Association, in U.S. House of Representatives, Committee on the Judiciary, Subcommittee on Immigration, Refugees, and International Law, *Administration's Proposals on Immigration and Refugee Policy* (Washington, D.C.: 1981): 88-98.

If, however, we accept the assumptions of the opponents of an expanded H-2 program, we would have substantial grounds to expect considerable *indirect* impact on state services. Their scenario begins with the premise that employers prefer foreign workers because of their higher productivity and lower costs. Therefore, easing the requirements for obtaining temporary foreign workers would lead to the displacement of considerable numbers of American citizens and eligible Haitian refugees from the migrant labor stream, especially in citrus and vegetable production. Complete displacement or even reduction in hours worked would lead directly to diminished income, which in turn would lead to increased demand for a wide variety of supplementary services, including financial assistance, unemployment compensation, food stamps, health care and medical services, job training, housing, and legal aid. Federal, local and voluntary agencies, rather than the state, provide many of these services. But to the extent that such groups failed to fulfill these needs, the standard of living of displaced workers and their dependents would deteriorate further, and state and local governments could find themselves forced to provide increased basic survival support and public security.

SIMPSON-MAZZOLI VS. THE REALITIES OF MEXICAN IMMIGRATION

by Wayne A. Cornelius
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The essays of this anthology have placed in perspective many of the crucial issues in the current debate surrounding proposed revisions of America's immigration policy. This essay will review some of the observations and insights contained in this volume; it will offer some new perspectives, both from Mexico and other countries which send large numbers of migrants to the United States, and from those nations which have experimented with immigration laws similar to the one currently under consideration in the U.S. Congress; and it will present some conclusions that we might draw from this collection of expert opinion and analysis.

As Charles Keely and Lawrence Fuchs have indicated, we have had for at least the last ten years what most members of the U.S. public see as a major "illegal alien" problem. Like so many of the social and economic problems that our country faces today, this one is largely self-inflicted. A series of changes in U.S. immigration law and policy in the period since 1964 have made migration to the United States much more difficult for certain kinds of people. These changes apply particularly to those who have low incomes, who are neither white-collar nor highly skilled, and who lack immediate relatives (spouses, adult children, or parents) who are U.S. citizens.

If one has the added misfortune of coming from a country like Mexico, which has a huge demand for U.S. immigrant visas but a quota of only 20,000 visas per year, legal admission to the United States is even more difficult. With the unilateral termination of the Bracero Program in 1964, the U.S. basically eliminated a legal entry option for those Mexicans who did not want to become permanent residents of the U.S. — those who wanted only a sojourn of relatively high-paying employment in this country. In its place, we have had the H-2 program which Terry McCoy has described — a system that has all the defects of the former *bracero* contract-labor program but has worked much less efficiently and has been virtually unused by employers who rely upon Mexican labor.

Unfortunately, while we have narrowed the legal-entry option for most would-be migrants from Mexico, the U.S. employer demand for their labor has not decreased appreciably, and the supply of surplus (or at least underemployed) labor in Mexico has increased significantly during the last two decades. Market forces, working within a more restrictive framework for legal immigration, have produced a large, clandestine flow of migrant workers from Mexico and other Caribbean-basin countries to the United States. This outcome was inevitable, given the powerful economic and demographic forces at work in both the sending countries and in the U.S., and given the failure of the U.S. political and legislative process to provide an adequate legal-entry option for enough people from those countries most likely to export low-skilled labor to the United States.

In Western Europe, because of the guest-worker programs created in those countries during the 1960s, the illegal component of immigration has been relatively small. Only about 10% of the total number of foreign workers who entered the EEC countries, according to the best available estimates, did so illegally. The European guest-worker programs did have their share of problems, but most of their difficulties (e.g., failure to set a limit on the length of stay) arose as a result of actions by the governments of the host countries and their citizens. The difficulties aside, the European countries avoided through this mechanism an "illegal alien problem" on anything approaching the U.S. scale.

As Aristide Zolberg's theoretical analysis suggests, the experience of most of the world's industrialized countries during the last two decades has shown that the governments of labor-importing countries often lack the capacity to influence most aspects of international labor migration (e.g., the volume, the destinations, and the permanence or temporariness of the migration); but they can determine, to a large degree, whether the migration will take predominantly legal or predominantly illegal forms. The level of such labor migration is usually determined not by governments, but by immigrants and their employers. The most that governments can do is either to facilitate or (to a lesser extent) to impede these worker movements — not to stop them. So the real policy issue for the United States in this area lies in attempting to influence the size of the illegal component of migration flows.

Over its 100-year history, Mexican migration to the U.S. has developed into a highly institutionalized phenomenon which thrives on thousands of kinship networks with "anchors" in both countries. Certain firms and sectors of the U.S. economy have come to rely almost totally on Mexican or other foreign workers. Given the huge wage differential between Mexico and the U.S., recently widened by peso devaluations and skyrocketing inflation in Mexico, the U.S. at this time is not facing a decision about whether to import foreign labor or not. This country made that decision, at least with respect to Mexican labor, four or five generations ago.

The hard reality is that neither the U.S. nor the governments of the main source countries now have the capacity to shut off or sharply reduce the flow simply by policy decision or legislative fiat. The United States cannot build a wall around its economy, hoping to cut off new entries of foreign workers, so that it can concentrate on legalizing those who are already here as permanent settlers. Short of a full-scale militarization of the border, no policy will prevent a continued influx into this country of Mexican migrants who cannot meet the stringent criteria for admission as permanent legal residents, usually because they lack immediate relatives who are U.S. citizens. These people will come legally if they have a legal-entry option, illegally if they do not. So the issue of reducing the size of the illegal component in this flow remains. Attaining that objective is extremely difficult at a time when the U.S. is mired in an economic depression, and when two out of three Americans, according to a 1980 Gallup poll, believe that the U.S. should halt *all* immigration until the unemployment rate falls below five percent — which many economists doubt will happen again in this century.

The Simpson-Mazzoli Approach

Despite these unfavorable conditions — some would say because of them — the U.S. Congress is now plunging forward with its first major effort to overhaul our immigration laws and policy since 1952. The proposal under consideration, the Simpson-Mazzoli Bill, has received strong bipartisan support from members of Congress and the general endorsement of the Reagan administration.

The Simpson-Mazzoli Bill is a sprawling, complex piece of legislation, but its main objective is to reduce illegal immigration. To accomplish that end, it relies basically on a single remedy: employer sanctions. This provision of the bill would impose a graduated series of penalties — beginning with warnings and civil fines of $1,000 per illegal immigrant employed, ending with a $3,000 criminal fine per alien or one year in jail, or both — on employers who "knowingly hire" people who have not been authorized to work in the United States.

As indicated by Manuel García y Griego, the basic idea is simple: to curtail the flow of new foreign entrants, we must eliminate job opportunities for them in this country, and the way to do that is to penalize their employers. According to its proponents, this approach will also induce illegal aliens who do not qualify for amnesty (legalization of their status) to go back to their home countries by making them unemployable. The logic of this approach is persuasive enough to have won the editorial endorsement of nearly every major newspaper in the United States. In practice, however, the employer sanctions approach turns out to be a quack remedy.

Virtually all members of Congress, as well as editorial writers and columnists, have chosen to ignore the fact, pointed out by Kitty Calavita and Carl Schwarz, that this approach to immigration control has already been tried in a dozen U.S. jurisdictions since 1971 and in at least 20 other countries around the world. The results have been practically identical in each case: employer penalties have not reduced the hiring of illegal immigrants and often have created additional problems. The eleven states in this country that have adopted this type of legislation include California and most of the other states that have large concentrations of undocumented immigrants. As Schwarz has reminded us, not a single person has ever been convicted under California's employer sanctions law since its passage in 1971, and nationwide, state-level employer sanctions laws have resulted in only five convictions: one in Kansas, where a convicted employer got a $250 fine; two in Virginia, where the convicted employers received fines of $80 and $55, plus a 30-day suspended jail sentence; and two in Montana against the same corporation, which decided not to contest the $3,200 fine because the legal expenses of an appeal would have exceeded the amount of the penalty.

Similarly, the major General Accounting Office report cited by several of the contributors to this volume concluded that in all of the 20 countries surveyed by the GAO, "laws penalizing employers of illegal aliens were not an effective deterrent to . . . illegal employment . . . . Employers either were able to evade responsibility for illegal employment or, once apprehended, were penalized too little to deter such acts."[1] Clearly, judges do not consider the employment of undocumented workers a serious crime, and they are reluctant to impose penalties. And the more severe the penalty, the less likely it is to be applied, especially criminal fines and jail sentences.

Proponents of the federal-level employer sanctions embodied in the Simpson-Mazzoli Bill dismiss the abysmal record of prosecution and conviction under existing state laws as evidence only of the need to deal with the illegal immigration problem on a national basis. They point out that the fines prescribed by several of these state laws were not heavy enough to deter most employers and argue that the worldwide failure of employer sanctions laws to deter the employment of illegal immigrants should not diminish our confidence in the remedy. The proponents of the Simpson-Mazzoli Bill have adopted this line of argumentation because, despite the failures noted above, none of the countries with such laws on the books have abandoned them. Instead, as the GAO report revealed, several countries recently have put more teeth into their laws and urged judges to take the penalties more seriously.

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1. U.S. General Accounting Office, *Information on the Enforcement of Laws Regarding Employment of Aliens in Selected Countries* (August 31, 1982).

The GAO reported that France and Germany had enacted new laws to increase the effectiveness of existing employer sanctions. These laws, which went into effect on January 1, 1982, increased the maximum fine for violators from $20,000 to $40,000 in West Germany and from $450 to $3,000 in France. Germany's new law also eliminated a loophole that enabled an employer to evade responsibility by "leasing" workers from subcontractors and allowed various law-enforcement agencies to pool information on suspected employers of illegal immigrants. The report also noted that Canada has made the enforcement of employer sanctions "a higher priority" for the Royal Canadian Mounted Police and that authorities in Hong Kong planned to introduce a new computerized system of worker identification that would hinder counterfeiting of credentials. The GAO could not assess the effects of these changes, since its field investigation ended just as the changes were being implemented, and it has done no follow-up studies.

Senator Alan Simpson, the principal author of the employer sanctions legislation pending in Congress, requested the original GAO report on this subject but has not requested any updated information. His staff believes that it is "too soon to tell" about the possible consequences of the recent changes in laws and enforcement strategies in the countries previously studied by the GAO. They note that authorities in Hong Kong reportedly told Attorney General William French Smith that their new identification system designed to prevent illegal immigrants from obtaining employment was "working well." Yet no independent source has confirmed that Hong Kong's worker-identification system has solved its illegal alien "problem," which has been less than monumental in the recent past (an estimated 5,500 illegal aliens were in Hong Kong in 1982). In fact, there is still not a single documented case of successfully using employer sanctions laws to reduce the population of illegal immigrants *anywhere in the world.*

None of the recent changes in laws and enforcement strategies mentioned in the GAO report and trumpeted by defenders of Simpson-Mazzoli can be expected to have a dramatic impact on the situations depicted in that report. If a $20,000 maximum fine failed to deter West German employers from hiring Turkish "illegals," why should a $40,000 fine be more effective? As the GAO reported, German employers "generally appeal administrative fines that they consider too great. Such appeals have generally met with success, as judges have not considered the hiring of illegal aliens a serious violation. Because judges have been lenient, . . . employers accept the fines as a business cost."

Essentially the same picture emerges from all of the other countries studied by the GAO. Employers have devised an endless variety of schemes — and Barbara Strickland's essay includes some examples of them — to evade legal responsibility under employer sanctions laws; and judges are reluctant to impose more than token penalties on these "white-collar criminals," who are usually respected small businessmen in their communities. The few unlucky employers who have been caught and convicted have successfully appealed their cases, securing much reduced fines or avoiding penalties altogether. Thus, police and prosecutors are understandably unenthusiastic about investing much time and effort in taking such cases to court.

But if civil fines are not an effective deterrent, what about criminal penalties? In Germany, for example, employers can be tried as criminals and imprisoned for up to three years for employing illegal immigrants under deplorable working conditions. But when queried by the GAO's investigators, German officials did not know of any employer who had even been imprisoned as a result of such a violation. "Legal proceedings against employers are few because employers and illegal employees cooperate and refuse to testify against one another," the GAO reported. In Canada, court backlogs and excessive costs involved in keeping the illegal immigrant (the prime witness) in Canada for the employer's trial have caused officials to forego prosecuting many employers. In the first nine months of 1981, only 27 employers were prosecuted under Canada's employer sanctions law. Will judges in the United States be any less reluctant to jail employers convicted of hiring unauthorized immigrants? The more severe the penalty, the less likely that judges will apply it in such cases.

Defenders of the Simpson-Mazzoli Bill argue that authorities can maximize the law's effectiveness by encouraging voluntary compliance, which they can allegedly bring about by targeting enforcement efforts on firms known to be "major employers" of illegal aliens. But recent data from several studies of Mexican "illegals" show that the vast majority of them work in small businesses with fewer than 50 employees. Another enforcement strategy under discussion would emphasize highly publicized test cases of prosecution in large cities. However, anti-immigrant hysteria among the general public would probably have to be considerably more intense than at present to guarantee a high level of public tolerance for such "show trials."

Employer Sanctions — Who Pays?

At the state level, this kind of legislation has had an adverse impact on immigrant workers themselves, rather than on their employers, and such laws have sometimes worked to the detriment of Hispanic-origin U.S. citizens, an issue explored in the present volume by Alejandro Portes and Frank del Olmo. The undocumented worker is already vulnerable to exploitation or blackmail by unscrupulous employers because of his or her illegal entry into the United States. The Simpson-Mazzoli Bill will exacerbate this problem by giving employers a motive to compensate for a perceived risk of being fined under an employer sanctions law. As Kitty Calavita's research has revealed, such laws cause deterioration in wages and working conditions for the undocumented and increase the worker's fear of arrest and deportation. Like workplace raids conducted by the Immigration and Naturalization Service, employer sanctions legislation does not reduce the employment of undocumented workers. Such actions only drive the hiring underground. They intensify the immigrants' fear and increase the employer's power to manipulate this fear through threats to call immigration authorities when workers complain about wages or working conditions.

Despite what some employers may tell their illegal-immigrant employees, the employer's actual risk of detection and prosecution under the Simpson-Mazzoli Bill will be quite small. When President Jimmy Carter's Attorney General, Griffin Bell, was asked how the Justice Department expected to enforce the Carter administration's proposed employer sanctions law, he replied: "We are traveling on the assumption the Americans are law-abiding people . . . . Once they realize it is now the law that you should not employ an undocumented alien, they will follow the law." The Reagan administration and most of Congress now ask us to make a similar leap of faith. But in all probability, voluntary compliance will not be widespread enough to produce any noticeable reduction in the hiring of undocumented immigrants.

Moreover, Congress is not likely to allocate enough resources to enforce the employer sanctions provision of the Simpson-Mazzoli legislation; and much of its appropriation would in any case be spent on the printing and distribution of affidavit forms that employers would have to fill out for each new employee hired. With these forms, an employer would attest that he or she had inspected certain common identifiers such as Social Security cards, driver's licenses, and birth certificates. As in Canada, the illegal immigrant applying for a job can easily circumvent this system by purchasing bogus identification cards or borrowing legal cards from friends or relatives. But again, Simpson-Mazzoli would victimize the undocumented by making the use of fraudulent documents to obtain employment a felony. Eventually, a new counterfeit-resistant worker-identification card and a nationwide computerized verification system for such cards might reduce these problems. But the Reagan administration itself has estimated the cost of such a card and verification system at between $850 million and $2 billion.

In light of all this evidence, the confidence that most members of Congress and media commentators still place in the employer sanctions concept is nothing less than astonishing. Their faith represents a classic example of the "don't let the facts get in the way" approach to public policymaking. The authors of the pending legislation, Senator Simpson and Congressman Mazzoli, have at least practiced the virtue of candor. They have described their bill as a "leap into the dark" but stand by the proposal because, they allege, previous employer sanctions laws have failed to reduce the hiring of illegal immigrants due to a lack of proper enforcement. They argue that with enough money, personnel, and a strong will to enforce, employer penalties can be an effective means of immigration control. Unfortunately, there is still not a shred of evidence to support this claim.

A Politically Necessary Experiment

Nothing that the U.S. government has done in the last 100 years has appreciably reduced the demand for Mexican and other foreign labor in our economy. Given this track record, this country may today be facing the alternatives of immigration regulated by market forces or militarization of the border, coupled with the kinds of internal controls on population movement that some European countries have but that most Americans would find intolerable. This type of governmental "cure" seems, on the basis of existing evidence, worse than the perceived "illness."

Nonetheless, the U.S. is apparently condemned to having a great national experiment with employer sanctions. Those segments of the public who are even marginally concerned about immigration are demanding that their elected officials "do something" about illegal aliens, refugees, and other foreigners whose presence here they associate with a wide variety of economic and social problems. But the American people are likely to be disappointed by the results of their new immigration law. It seems destined to join the century-long procession of more-or-less symbolic laws in this field — laws which serve a political function but have no major impact on the underlying demand for foreign labor.

The United States today faces the challenge of somehow bringing its immigration laws into closer correspondence with the enduring economic and demographic realities that generate international labor migration. The Simpson-Mazzoli proposal fails that crucial test. It and all other legislation that ignores the realities of illegal immigration from Mexico and other countries can only breed more illegality, as would-be immigrants and their employers scramble to adapt to another change in the rules of the game.

Several of the contributors to this volume have pointed towards a more realistic (though politically unattractive) approach to the issue. That approach, I submit, would begin by recognizing that Americans simply do not want some kinds of jobs in some industries in some parts of the country. U.S.-born workers will not likely fill these jobs, regardless of the incentives that the government may try to create or the penalties that it may seek to impose on employers who hire without regard to immigration status. With that realization, we could then get on with the business of improving the status of the foreign workers who do want to fill those jobs. Legalization of their status in the U.S. (under a plan which will minimize the procedural difficulties raised by Thomas Heller and Robert Olson), more vigorous enforcement of minimum wage and fair labor standards laws, and noninterference by immigration authorities in efforts to unionize undocumented workers would all serve to increase the bargaining power of foreign workers in the U.S. labor market. We might thus reduce the immigrants' vulnerability to exploitation as well as their tendency to depress wages and working conditions for some U.S. citizens employed in the same firms. This approach may not affect the level of immigration, but it would substantially reduce the adverse effects of the immigrants' presence in our labor markets.

APPENDIX A

EDITED COMMENTS OF SELECTED SPEAKERS AT THE 1982 EARL WARREN COLLEGE SYMPOSIUM*

David Hiller**

This is a critical time in our nation's history of dealing with the issue of immigration. I hope that this historical juncture will produce a major reform of our immigration laws as proposed in the Simpson-Mazzoli Bill. The Reagan administration is continuing its support for this bill and remains very hopeful about its passage. Differences have emerged between the administration's original proposal and those proposals now under consideration by Congress, but I believe that the Simpson-Mazzoli legislation reflects as good a political balance and presents as clear a vision regarding U.S. immigration law as we are likely to see in the near future. The Attorney General has therefore made the passage of Simpson-Mazzoli a top legislative priority, and the administration as a whole considers the bill a very important measure.

The administration owes a very large debt of gratitude to the Select Commission on Immigration and Refugee Policy. That commission made a monumental effort over the two years of its existence and ultimately achieved a consensus on a wide range of measures for dealing with the immigration problem. It delivered its recommendations to the administration during a time when the issue of immigration had aroused a considerable amount of political agitation. Only six months or so prior

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**Editors' note:* This appendix comprises edited versions of the oral presentations of selected participants in the Warren College Symposium who did not submit written works for inclusion in this volume.

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to the Commission's report, the Mariel boat lift had shocked the entire country by revealing our susceptibility to sudden and uncertain migration flows. At the same time, the U.S. was struggling with extraordinarily high levels of refugee admissions. Many Americans had the sense that our legal admissions of refugees had joined illegal immigration as a problem which had got out of control.

The administration decided very early that it would, to the extent possible, set its face against the very popular restrictionist sentiment favoring substantial cutbacks on legal immigration and on refugee admissions. President Reagan's instincts, based on his experience in California and his friendship with Mexican President José López Portillo, are to be very generous in the area of migration. During an interview with Walter Cronkite around election time, President Reagan noted that he was intrigued by the idea of substantially opening the border between Mexico and the United States, a notion which fit within his concept of a North American accord including both Mexico and Canada. In sum, the President and the Cabinet decided early that, in terms of legal immigration, we would preserve the hospitality that for many years had distinguished America's immigration policy.

Partly because of the short time remaining before the Congressional elections, the administration decided in 1982 to focus its efforts in the area of immigration on the pressing problem of illegal migration and on the proposal for mass asylum. Having chosen to address these issues, the administration had to make a fundamental decision about whether to maintain the limits of our current legal immigration program or to expand that program so as to regularize and accommodate the undocumented flows that had been arriving since at least the mid-1960s. We decided to do some of both, but by and large to retain the legal admissions and the refugee admissions programs as written in the current law. We decided to attempt to build an enforcement policy, moreover, that would bring the reality of migration into line with the law. In that regard, we decided to support the employer sanctions proposal.

Most of the Cabinet were initially, if not entirely opposed, at least very skeptical of the feasibility and wisdom of instituting a regime of employer sanctions. Moreover, the plan ran against the grain of the administration, which had been elected in part on the proposition that the government was already "too much with us," that it imposed too many regulations, and that these regulations constituted a drag on business. However, the more that the Attorney General studied the issue of undocumented migration, the closer he came to the conclusion that a workable and credible strategy for dealing with the issue would have to rely on the requirement that employers not hire undocumented workers. Gradually the Select Commission's judgment about employer sanctions also came to prevail within the Cabinet, although not without substantial discussion and debate.

The same held true about the second major element of the administration's focus, the issue of legalization. The proposal that we grant amnesty to the millions of illegal aliens who came into this country while our laws were not being seriously enforced also ran against the grain, at least initially, of many in the administration. They argued that such a proposal would reward wrongdoers, that it would be unfair to the prospective immigrants who have waited patiently and legally for the right to enter, that it could be a substantial burden on Americans who would have to foot the bill, and that any wholesale amnesty would encourage many more aliens to enter illegally in the hope that the amnesty would continue. Nevertheless, the logic and humanity of a proposal for legalizing the status of illegal aliens already in the U.S. persuaded the administration. In our recommendations on this proposal, we departed somewhat from the views of the Select Commission. We proposed that candidates for amnesty receive temporary legal status before assuming all of the benefits and rights of legal residents (such as bringing their families or qualifying for welfare benefits) out of a sense of fairness, both to those who have immigrated legally and to those who would bear some part of the cost. We also recognized that a large-scale legalization program would represent a major political undertaking and would be controversial. We can expect to see an effort to make the legalization proposal much more restrictive or to delete it entirely, which the administration feels would be most regrettable. The amnesty proposal is an essential part of this legislative package, which loses its logic if any of its elements is removed.

On the matter of refugee admissions, our current system and the litigation that it has generated have paralyzed the admission process. Not many years ago, the United States received two to three thousand petitions for political asylum per year, a number which has recently risen to 40 to 60 thousand. We currently have a backlog of some 123,000 such petitions, and this volume of requests has created procedural and administrative problems for the agencies involved. The Simpson-Mazzoli Bill attempts to simplify somewhat the process for deciding asylum cases while preserving the fairness of the hearing procedures for exclusions and deportation.

Finally, the proposed legislative provisions for admitting temporary workers into the United States when insufficient numbers of American workers are willing to fill certain jobs has become one of the most contentious issues in the debate. The Select Commission had declined to propose an expansion of the H-2 temporary-worker program, although it did suggest that the program might be streamlined. Many analysts have proposed the creation of very large guest-worker programs on the premise that such a plan could channel most of what is now undocumented migration into a legal channel, but we in the administration decided that we could not responsibly go the route of endorsing such a proposal. However, the arguments of many employers, particularly in agriculture in the West and Southwest, persuaded us that the introduction of employer sanctions could substantially reduce the size of their available work force. We therefore have worked very hard on revisions in the current H-2 program which can guarantee access to temporary foreign workers to employers with a genuine need. At the same time, we have given special attention to retaining the safeguards in that program which protect American workers from deteriorating working conditions and diminishing wages as a result of the importation of foreign workers.

The administration feels that Simpson-Mazzoli is as good a bill as this country is going to see, possibly for years, and we think that it would be tragic to lose the work of the Select Commission and that of previous administrations.

Jerry Tinker*

This presentation will go back to the roots of the Simpson-Mazzoli Bill in an attempt to explain the political forces behind the legislation as we see it. This bill originated in the unfinished agenda left from the 1965 reforms of U.S. immigration policy. In that year, Congress completed the first real overhaul of our immigration law since 1924 by striking out the racist basis of that law, the national-origin quota system. But the 1965 reform left many issues unresolved — how to treat migration from the Western Hemisphere, how to process refugees, and how to operate the preference system — issues which the reformers assumed would be taken up during the late 1960s and early 1970s. For a variety of reasons, these issues remained unaddressed, and we entered a period of almost total neglect that lasted for nearly a decade. Some members of Congress did address the issues, and members of the House even introduced reform legislation, but the bills died in the Senate due to the indifference of Senate Judiciary Committee Chairman James O. Eastland of Mississippi.

The failure to produce reforms during this era did not, however, indicate a total lack of movement on the issue. The concept of employer sanctions emerged during this time, as voluntary agencies, church groups, and labor organizations expressed their concern about the exploitation of undocumented workers by certain employers and protested the fact that the sanction of law fell only on the undocumented person. Certain groups also raised the issue of abuses of commuter aliens and the need to protect these migrants. Again, members of Congress introduced bills in these areas, but without results. Presidents Ford and Carter established interagency task forces that reviewed some of these issues and proposals, but they were unable to muster enough support in the Senate to force Senator Eastland to move. When in 1978 Eastland announced his retirement and Edward Kennedy succeeded him as Judiciary Committee Chairman, the opportunity to address immigration reform finally came.

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Senator Kennedy felt that we should learn from the lessons of the 1965 reform act, which had emerged from the recommendations of a major investigation commission, the Truman Commission of 1952. The creation of such an investigative body had raised the issue above the parochial swirls of Congress and gave it a more thoughtful airing and review. For that reason, Kennedy and the Senate embraced the 1978 House bill which created the Select Commission on Immigration and Refugee Policy and gave it a two-year mandate. From Senator Kennedy's point of view, the goal in this effort was not only to assess migration in a more objective way, but also to show that immigration is not really a problem that we must solve, but rather a phenomenon that we must cope with, regulate, and legalize. Congress has a terrible tendency, which probably reflects the American character, to identify something as a problem, roll up its sleeves, and take action toward a solution. Migration is simply not a "problem" to be "solved" with this kind of approach.

While the Select Commission did not find any magic formulas, it did develop a comprehensive approach. It enhanced our understanding of the international dimensions of the phenomenon, gave us new parameters within which to estimate the size of contemporary migratory flows, advanced our understanding of the pressures that lead to migration, and moved the issue from the back burner to the forefront of national attention. As Lawrence Fuchs has indicated, we can trace the lineage of the Simpson-Mazzoli Bill directly to the Select Commission. So why did Senator Kennedy depart and dissent from the bill as it emerged?

Kennedy opposed the Simpson-Mazzoli proposal partly because the bills that came to Congress, both from the Reagan administration and from Senator Simpson and Congressman Mazzoli, lacked the kind of vision contained in the Select Commission's report. What had started under the Commission as immigration reform had simply become immigration restriction. Five specific concerns prompted Kennedy to oppose the Simpson bill in 1982 and to attempt to amend it on the Senate floor.

One of his concerns centered around the issue of international cooperation. No one claims that we are suddenly going to achieve international cooperation on migration, but we must begin to work in that direction. While Senator Simpson has traveled to Mexico and other countries to discuss the issue, the Reagan administration has not demonstrated similar concern for dealing systematically with this issue. Senator Kennedy feels strongly that we must develop a systematic and long-term strategy for achieving international cooperation on immigration, through both bilateral and multilateral efforts.

On the issue of employer sanctions, Kennedy has in the past endorsed the concept as a principle of equity and continues to support it on those grounds, but he saw serious flaws in the proposal as presented in the Simpson-Mazzoli Bill. The legislation did not adequately address the possible discriminatory impacts of an employer sanctions program, and Kennedy saw evidence that the program would receive insufficient resources for implementation. This set of circumstances would likely lead to a situation in which all available resources would be allocated to enforcing the law and none to protecting citizens and legal residents against its discriminatory effects. He therefore proposed an automatic "sunset" provision in the bill, a provision which would stipulate that if after three years the President could not certify to Congress that the bill had resulted in no pattern of discrimination, then the employer sanctions provision would terminate until Congress provided remedial action.

Senator Kennedy and his staff were also concerned over the changes that the bill introduced into the temporary-worker program. The Select Commission had voted unanimously that the evidence at hand did not in any way justify establishing a large-scale program for admitting temporary foreign workers. If the amnesty program and the changes in the immigration system which would allow for additional legal immigration do not result in sufficient labor for certain markets, we can then consider an expansion of the temporary-worker program. But we should not draw the conclusion in advance of the evidence.

That issue led to another concern, a concern about the legalization proposal as it has evolved. Amnesty is indeed a controversial political issue; but if we are going to bite the bullet and take the political heat, we should pay attention to the Select Commission's review of such programs in other countries, which revealed that legalization programs work only if they are generous. Only a generous, flexible program will persuade undocumented aliens to emerge from their subclass and show themselves to immigration authorities. A limited or constricted program will not work, and we would have taken the political heat for nothing. In a rather surprising move, the Senate Judiciary Committee adopted Senator Kennedy's amendment to move the "legalization date"* from January 1, 1980 to January 1, 1982, but we lost that amendment on the Senate floor. As passed by the Senate, the bill's provisions for amnesty were simply too narrow and would not have worked.

Finally, Senator Kennedy has deep concerns about the issue of judicial review. All of us agree that the delays in the current process by which we exclude, deport, and judge asylum claims are costly and probably unfair, even to the people whom the system should serve. The system needs streamlining, and Senator Kennedy agrees with much in the bill that addresses this need, but he does not agree that we should remove the judiciary from the process entirely. No evidence suggests that judicial review would be abused under the new system, and until we see whether the new system works, we surely should not take such an arbitrary step as to limit the role of the judiciary in the immigration system.

In conclusion, I think that the Simpson-Mazzoli Bill has advanced the level of debate about immigration in a very important way. There is still room for compromise, and there is still room to improve and perfect. Even if the bill were passed tomorrow, our government probably would not be able to implement it for several years, given the rate at which the Immigration Service currently handles this work. So for many reasons, we should not plunge headlong into passage of this bill but rather engage in further, thoughtful review of the issues.

Arnold Leibowitz**

This presentation will deal with one of the more difficult aspects of the Simpson-Mazzoli Bill, namely, its

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*Undocumented persons would qualify for amnesty only if they entered the U.S. prior to this date — *editors' note.*

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implementation. We who are working on the bill had not thought much about implementation because we regarded that issue as a second stage, a matter of concern following the bill's passage. However, the prediction of many observers that the bill will pass in the 98th Congress has led us to think about implementation a bit more carefully. We find several reasons to be optimistic about the prospects for successful implementation of the bill.

The first is history. "Don't worry about implementation," an old hand in immigration policy recently told me; "immigration always works out in this country." We as a nation have long accepted large numbers of immigrants into American life, and we have developed from that experience a certain confidence that we can admit people of different religions and races and successfully incorporate them into our society. The Simpson-Mazzoli Bill may include more far-reaching provisions than we have ever introduced before, particularly the amnesty proposal. As some detractors have alleged, this provision may indeed represent a major regulation of the marketplace, but we have regulated the labor market before with the Social Security system and other similar intrusions, and we have survived.

Secondly, certain international activities in the developed world give us reason for optimism. Regardless of the debate over particular provisions of Simpson-Mazzoli, its approach is by now conventional wisdom for dealing with immigration; it emerged not only from studies and inquiries conducted by other administrations, but also from an examination of policies in other countries of the developed world. Almost all such countries have enacted employer sanctions laws and have legalized undocumented immigrants. We discussed these laws with immigration officials in a number of these countries, and they explained why their statutes either did not work or were not working as well as they should and what changes they are making to improve their effectiveness. In designing the law, we took into account the experience of countries such as France, Germany, Venezuela, and Hong Kong, not only in terms of employer sanctions and legalization provisions, but also in such specific areas as asylum adjudication and guest-worker systems. We are not, in short, reinventing the wheel.

Another reason for our optimism lies in the history of bipartisanship and cooperation out of which the Simpson-

Mazzoli Bill emerged. Community groups, scholars, lawyers, and many others participated in the Select Commission hearings from which the bill developed, and when the Reagan administration put forward its proposals, they too went through a hearing process. Finally, when Senator Simpson introduced the bill, he gained a large measure of bipartisan support for it through his willingness to compromise. The design and drafting of this bill have thus involved broad segments of the community — an involvement without which implementation could not go forward, because the success of this legislation will depend on community support and co-operative effort. We do not envision simply handing the statute over to the INS for that agency to work out the details of enforcement. The implementation provisions of the bill do give the lead to the INS and the Justice Department, but the bill's proponents also anticipate the active participation of other parts of our society.

Furthermore, the allegation that no one has planned for implementation is simply not true. The INS and the Justice Department have successfully engaged in a major effort to design an implementation plan. They have met with voluntary agencies in the community and have set up internal task forces to plan the implementation of each of the bill's provisions. With regard to legalization, for example, the INS has set about designing a plan which would allow this program to go forward without any disruption of regular INS activities. The agency's plan relies heavily upon community outreach and the participation of voluntary organizations, which the INS would contract to perform certain tasks, such as initial screening, interviewing, legal-rights counseling, and completion of paperwork. Since an undocumented person could visit one of these agencies without risking deportation, the INS hopes that the program will improve on the dismal record of only 10-20% participation in the legalization programs of other countries. After completing the functions of screening and counseling, the voluntary organizations would pass amnesty documentation along to a central office for processing. This office, which would be removed from the rest of INS to avoid disruption, would emphasize fairness and efficiency. The plan would thus allow officials to make decisions about amnesty without involving them in the political tension that surrounds this issue. Finally, the implementation scheme provides for automatic appeal and administrative review in cases of unfavorable decisions.

On the matter of employer sanctions, the government has done less planning for enforcement, partly because of the nature of the task and partly because of the somewhat unpredictable role of the marketplace. In general, our enforcement agencies assume that most employers will obey the law. Since the legislation, at least the Senate version, provides no exemption from sanctions against employers of illegal aliens — not even for private households or very small businesses — the community will have to cooperate and respond to the law in a way that distributes its risks and burdens fairly. The law provides for a large-scale, six-month effort to educate the community about the statute, about the obligations of employers under it, and about its benefits to undocumented aliens. This educational effort will make employers aware that they must look at two identification documents verifying a person's legal right to work in this country, that they must do so for everyone, and that they must keep on file an attestation that they have examined these documents. Failure to do so would result in a penalty. Once this educational period has passed, the government expects to place new enforcement resources in the community, with specific enforcement efforts concentrated in those geographic regions which have large populations of illegal aliens.

With regard to the H-2 temporary-worker program, the Simpson-Mazzoli Bill addresses the specific needs of agriculture by separating agricultural labor from the rest of the program. The bill establishes a series of deadlines so that a grower seeking temporary foreign workers can be assured that bureaucratic delay alone will not force him to forego his crop. The bill also provides additional funding, to be raised primarily out of user fees, to assist the Department of Labor in its certification work and to speed processing.

The implementation of the bill's adjudication provisions, we hope, will produce a better program of appeal and review than we have had in the past. Both the House and Senate versions of the bill provide for a new asylum adjudication force, efficiently managed and with sufficient clerical and administrative resources. Even now, the executive branch is conducting a reorganization to overcome past administrative weaknesses. This reorganization will transfer the immigration judges, along with the Board of Immigration Appeals, from the INS to the Department of Justice. Both will operate under an executive board which will provide training for immigration judges, deploy personnel where they are needed, and provide clerical and administrative support for each judge.

Finally, the accusation that Simpson-Mazzoli is a restrictive bill with respect to legal immigration simply is not fair. It is, without question, a control bill. But in selecting the number 425,000 as the level of annual immigration, the bill's drafters set a very high limit. That number reflects the most recent levels of legal immigration to this country, which have increased continuously over the past few years. The bill could have set the level much lower by computing averages over time or through other means, as many people proposed. That did not happen.

In all fairness, I admit that the bill does prevent increases in immigration levels by subjecting to numerical restriction those categories which have been exempt. Since Simpson-Mazzoli does not provide for a rising level of legal immigration, it in effect restrains that growth. But the bill does not reduce the level below what it has been, and taking into consideration that it provides for a legalization program of somewhere around 2.5 million persons, one cannot call the proposal overly restrictive. In fact, many people fear that the generosity of the bill will create a sea change in terms of political involvement and participation in this country.

The Honorable Cruz Reynoso*

The Simpson-Mazzoli Bill is likely to fail for the same reason that American immigration policy has failed throughout history: we have always lacked clear statements of policy goals which mesh with the mechanics necessary to implement those goals. That failure, however, has not always been accidental. Let me begin with an historical example.

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When I began practicing law in 1959, the Bracero Program, which brought thousands of Mexican guest workers (*braceros*) to the United States, was in full swing. The law under which that program operated, Public Law 78, dictated that those workers could be brought to this country to work in agriculture only when willing and able domestic workers could not be found. The regulations further stated that the *braceros* had to receive the prevailing wage for the work that they performed. All of that seems to make sense. But even before I point out the problems that I saw in the implementation of the law, I would like to point out an internal contradiction in its conceptualization.

Our basic understanding of economics tells us that if an employer cannot find willing workers for a specific job at a certain wage, then that employer must raise the wage or improve working conditions or both in order to attract laborers. When we think about the notion of a prevailing wage, we think about those kinds of economic factors. But in El Centro, California, where I had established my law practice, such factors had not determined the prevailing wage. Government bureaucrats had simply decided that the prevailing wage would be 65 cents per hour, and guest workers so dominated the agricultural labor market that local agricultural laborers worked for 65 cents per hour or not at all. When farmworker advocates and labor unions mounted a huge campaign in opposition to the program, the government decided that the prevailing wage had suddenly changed to 70 cents per hour.

Moreover, when I asked why agriculturalists were importing labor in an area of persistently high unemployment, employers responded that local workers simply would not go out to the fields to work. When I asked why, they answered that it is too hot in the Imperial Valley. As I was having that discussion, on a day in which the temperature easily exceeded 100 degrees, I saw some workers retarring a roof, and I could see steam rising from the tar. I pointed to them and said, "Gee, those workers are willing to work in hot weather. I wonder why?" Those workers, of course, received about $10 per hour, and that wage persuaded them to work in a place where the temperature rises to 130 degrees and even higher. Others allegedly refused to work in the fields because the temperature reaches 100 or 110 degrees. Of course, if the employers would pay the wage necessary to get those workers, they would get them. What, then, is the prevailing wage?

Even more important than this internal contradiction, however, was how the program worked — or rather, failed to work. When local workers wanted to take jobs in the fields, employers would not hire them because they preferred contract laborers, who were more malleable and worked harder, since a *bracero's* invitation to return the following year depended on his good behavior. Furthermore, the program quite obviously depressed wages, and many of those who refused work in the fields did so simply because they could not support their families on 65 or 70 cents per hour. Finally, I saw much suffering among the contract laborers themselves. I represented literally hundreds of them in workers' compensation cases that arose out of job-related injuries, and I heard from others who had been injured and sent back to Mexico without having received medical treatment. I saw the suffering that occurred when the reduced income from workers' compensation left them without enough money to send to their families in Mexico. As an American I was not proud of the Bracero Program, and as a human being I found it disgusting. I was pleased when we terminated it.

Interestingly, every commentator who came before the Select Commission agreed that the Bracero Program had failed miserably; but when I lived in Imperial County in the heyday of the program, not one public figure took exception to it. Decision-makers, public officials, the editor of the paper — all of the "nice people" in town — supported the Bracero Program as the "economic lifeline of the Valley" where we lived. But when the program came to an end, life in Imperial County and its rural agricultural economy continued.

I bring up this historical example because I want to point out that in Imperial County at the time of the Bracero Program, the influential people of the community seemed to agree that P.L. 78 was absolutely marvelous, and now everybody agrees that it was a terrible law. By the time it ended, of course, the contract workers had learned that they could work at jobs in the United States, and their employers had learned that Mexicans would take those jobs. So the *braceros* began to come to the U.S. as undocumented workers, and their number has increased so dramatically that we now have a political problem. Polls show that Americans do not want large numbers of undocumented workers in this country, and I agree that we should not have a large population of individuals who cannot avail themselves of the protection of the law because of their undocumented status.

The Simpson-Mazzoli approach to this political problem supports the allegation that undocumented workers take jobs from legal residents and citizens and that their presence in this country implies that we have lost control over our borders. The bill proposes to resolve these dilemmas by imposing sanctions on the employers of the undocumented and by expanding the temporary-worker program. But the Simpson-Mazzoli legislation will not work. If we want to reduce the large number of undocumented persons in this country, the worst thing that we can do is to create a new pool of future undocumented workers. By increasing the number of temporary foreign workers, either under an increased H-2 program or under some kind of "mini-Bracero" program, we will be importing large numbers of workers who will enter this country without documents when they can no longer get contracts. Secondly, when we understand that employers want *braceros* and undocumented workers because they work for lower wages and do not seek the protections that legal residents do, one means of solving the problem becomes evident immediately. We can insist that employers pay the minimum wage or a truly prevailing wage for each particular industry and that officials vigorously enforce health and safety regulations and other labor-standards laws. I have heard testimony from state officials to the effect that they do not vigorously enforce these laws so as not to give marginal industries an incentive to leave the area. We clearly have not tried to make existing legislation work as it should, and yet we are telling the American people that we will solve this problem with a new law. But whether or not enforcing the laws governing labor standards would solve the problem, I am convinced that the Simpson-Mazzoli Bill simply continues the sins of the Bracero Program and of the last 10 or 20 years of immigration law.

When I was a member of the Select Commission, I wrote a separate opinion dissenting from the commission's conclusions. In it, I argued that although our immigration laws are unjust and inefficient, I prefer them to the Select Commission's recommendations. When the Senate began working those recommendations into a legislative proposal in 1982, that body began to make changes, and every alteration worsened the package. The debate that took place in the House, moreover, appeared to move in the direction of making the proposal even worse than what had emerged from the Senate. If Simpson-Mazzoli eventually passes, the American people will ultimately realize that Congress has not dealt squarely with the issue; the answer, as Charles Keely has suggested, is to take a hard look at the issue, define the problems, come up with solutions that really make sense, then devote the necessary resources to their implementation.

Dale Frederick Schwartz*

Due to historical precedent and the way that our electoral political system functions, we in the United States tend to focus on domestic issues when debating immigration policy. That focus helps to explain why the President designates the Attorney General and not the Secretary of State as chairman of an interagency task force on immigration; why Congress has jurisdiction over the issue; and why relevant bills go through the judiciary committees rather than through foreign affairs. These kinds of particulars have a significant impact on the development of immigration law. The policymakers dealing with the issues addressed in Simpson-Mazzoli will certainly be influenced by popular concern about rising unemployment and growing economic uncertainty, as well as by the general historical tendency to blame immigrants and refugees for these ills.

Fortunately, the political rhetoric surrounding consideration of the Simpson-Mazzoli debate has been more civilized than past immigration debates, in large part because of the leadership represented at this conference. But irrespective of that leadership, political movement on the issue of immigration reform has been very difficult to achieve. To realize political movement on an issue, particularly one of this importance, requires a consensus about the fundamental underlying facts. In large measure, the dispute surrounding the Simpson-Mazzoli Bill arises from uncertainty about the extent to which undocumented workers displace American workers, about the number of foreigners residing illegally in this country, and about the forces that cause people to leave their homelands. This lack of information has complicated efforts to formulate long-range foreign policy approaches to the problem. If the research community, the academic community, and the "experts" on economic development, political stability, etc. could have worked together with policymakers and interest groups to determine the facts, the national debate and the policy proposals emerging from it might have taken a different direction.

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The way that the debate did develop reflected both uncertainty about the facts and the politicians' concern about the state of the economy. For example, the proposal for a greatly expanded guest-worker program received strong initial support from the administration. Many staffers in the White House felt that a relatively low-wage labor pool might in the short and the long term help the economy move, and western agricultural interests that have been friendly to the President would benefit from such a program. But rising unemployment turned the concept of a guest-worker program into a political liability, and the administration backed off. Yet the bill now contains a series of technical changes in the current H-2 program, which may well result in a guest-worker program much larger than that which the administration originally proposed. These modifications are too technical to explain to the public at large — probably not more than 15 people in Washington understand them — and as a result, labor unions, representatives of migrant workers, and others have had a difficult time gaining allies and mounting an effective lobbying strategy. Also, the politically relevant issue of numbers has not been part of this debate, so the absence of hard facts about the proposal — whether we will import 100,000, 200,000, or 300,000 guest workers — has hampered efforts to bring the issue into focus.

The legalization proposal presents even more thorny political questions. Proponents have made a strong argument that legalizing the undocumented would benefit the unemployed or underemployed in the United States. The argument asserts that, to the extent that undocumented workers are subject to exploitation, they are more attractive to certain kinds of employers, and Americans find competing for those jobs very difficult. If we bring the undocumented within the protection of the law, however, they can defend their rights for minimum wages, fair working conditions, unionization, etc. They will in effect have a less advantageous competitive position with respect to American workers. Legalization thus could very well benefit minority groups in this country who are concerned about unemployment, but making that argument in a way that will "sell" politically is very difficult. The counter-argument emphasizes that amnesty will reward lawbreakers and that it will cost billions of dollars: the $10.2 billion cost estimate produced by the Office of Management and Budget in the summer of 1982, coming as it did in a period of budgetary crisis, was almost a kiss of death. Many have questioned the merits of that five-year estimate, which seems to have had the political purpose of weakening support for legalization.

On the issue of employer sanctions, those who argue that they will not prove effective have a strong case. Looking behind the language used by the proponents of employer sanctions, we can see that the resources proposed to enforce employer sanctions will be inadequate to do the job. Money talks as loudly through its absence as through its presence.

And money has many voices. Some of the interest groups involved in the debate over Simpson-Mazzoli have the resources to buy advertising, to conduct massive direct-mail campaigns, and even to hire professional lobbyists. Their spending has made a great deal of difference in the evolution of the debate, while those who have the most immediately at stake — the immigrant refugee community — do not have those kinds of resources. Getting their message across has thus been very difficult, particularly because many Americans feel that these communities have been responsible for our worsening economic situation. And those interest groups which one would expect to support the immigrant communities — particularly the churches — have not done all that they should. One reason that Senator Kennedy had so little success in making amendments to the bill was that the pro-immigrant interest groups did not support him with hard lobbying. The church community very effectively lobbied against efforts to include refugees within an overall immigrant ceiling but failed to come through on some other issues. That failure has created tension between some church communities and ethnic organizations, who wonder why the churches have not more vigorously supported legalization. Implementation of the legalization proposal will require cooperation between ethnic organizations, churches, and unions; the developing tension among these groups could quite possibly hinder the process.

Finally, I would like to add a word about the restrictions of judicial review contained in Simpson-Mazzoli. The courtroom successes achieved by Haitians and Salvadorans during the past couple of years have created a backlash against judicial review. But if Congress responds to this backlash by enacting restrictions of judicial review, we will in the long run find such restrictions impractical and unprincipled. The executive branch need not fear the courts, as long as it obeys the laws enacted by Congress and acts in accord with Constitutional principle.

John Huerta*

In 1896 the Supreme Court estabilshed, in the case of *Lung Wing* vs. *United States*, that undocumented aliens are entitled to due process. Not until 1982, however, did the Court address the issue of equal protection for the undocumented, when it also decided in favor of immigrants in the landmark case *Plyler* vs. *Doe*. These precedents, however, leave unresolved the issue of Fourth Amendment protections against unreasonable search and seizure, for citizens and non-citizens alike, with respect to the issue of undocumented immigration. That is, to what extent can the INS stop and question people to determine whether they are lawfully present in the United States?

The INS relies upon Section 287A of the Immigration and Nationality Act for its authority to detain individuals for the purpose of determining legal residence. That law allows INS agents to interrogate any person *believed* to be an alien regarding his or her right to be in the United States, even a citizen or lawfully resident alien.

The Supreme Court has addressed this issue on a couple of occasions. In one of the most important cases regarding Fourth Amendment protections and the enforcement functions of the INS, the Supreme Court ruled that fixed checkpoints operated by the immigration service constitute a legitimate exercise of authority and a minimal intrusion on privacy interests. The Court decided the case, *Martinez Fuerte* vs. *United States*, in 1976, ruling that at such checkpoints the INS need not specify any individualized basis for having singled out a particular vehicle to search. In effect, the decision says that the enforcement interests of the state outweigh the small violation of privacy entailed in the procedure. But the opinion issued in this case carefully specified that the INS has this right only at fixed checkpoints. The decision cited the case of *United States* vs. *Brignoni-Ponce*, a 1975 case in which the Court ruled that a roving patrol had violated Fourth Amendment protections when it apprehended some people who looked like Mexicans. The Court insisted that the INS must be able to articulate specific facts in addition to rational inferences from those facts, which together reasonably warrant suspicion that a person or persons may be in the country *illegally*, and not merely that they be aliens.

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These cases provide the legal background for an important issue that relates to the Simpson-Mazzoli proposal: workplace raids. In a typical raid, the INS may receive an anonymous tip about the employment of undocumented workers at a given location. The agency then usually sends a plainclothesman to assess from outside the establishment whether or not the employees seem to be aliens. If so, the INS then usually contacts the employer to seek permission to talk to the workers. If the employer refuses, the agency must get a search warrant. When the raid actually takes place, the immigration service places agents at all entrances and exits of the raided establishment. Those agents usually wear a uniform, have a badge and handcuffs, and occasionally carry a weapon. Then other agents enter the plant to question the employees.

These raids have set off a spate of litigation all over the country. In the most important of these cases, the Ninth Circuit Court of Appeals recently held that the execution of a factory raid under these circumstances constitutes an unconstitutional seizure of the work force within the meaning of the Fourth Amendment. In this ruling, the court stated that the INS must be able to articulate objective facts and rational inferences from those facts that warrant a reasonable suspicion that each person detained is an alien unlawfully present in the country. The seizure thus must meet two conditions in order to comply with constitutional requirements: the INS must first believe that everyone that they seize in the raided establishment is an alien illegally present in the country; and secondly, the agency must be able to articulate reasons for suspecting the illegal status of each individual seized. In the case in question, the INS relied both on the testimony of individuals that the employer had hired undocumented workers and on the fact that the industry involved — the garment industry — has a reputation for hiring large numbers of workers without legal-residence papers. The court held that this reasoning did not justify seizing everyone in the plant. In effect, the ruling held that the sudden seizure of the plant violates Fourth Amendment protections because such a tactic, like a roving patrol, creates fear among the populace of arbitrary detention by law-enforcement authorities. The INS can still apprehend undocumented aliens in a factory, but it must now have information about particular individuals and cannot use that specific information as grounds for executing generalized raids.

This ruling has important implications for the implementation of the employer sanctions scheme proposed in the Simpson-Mazzoli Bill. The bill would require employers to examine two identification documents for each employee, complete a certificate attesting to that inspection, and keep the certificate on file for five years. The enforcement scenario envisioned by the designers of this proposal probably consisted of inspections of those records by enforcement personnel who would target particular employers. Such a strategy, however, will leave the INS vulnerable to the charge of discriminatory law enforcement, and some employer will certainly take that issue to court. Even setting that question aside, we may ask how the INS will know whether an employee has a certificate on file. Will the agency count the number of certificates and compare that to the number of employees? Since the agents will have access only to the file, an employer could pay employees on a cash basis and keep no records on them. How will the INS verify the accuracy of the employer's files? I would question whether the Simpson-Mazzoli Bill can depend on any effective enforcement mechanisms other than simple, good-faith compliance on the part of employers.

The Honorable William Wayne Justice*

The treatment of undocumented workers under the legal doctrine of equal protection presents a complex constitutional puzzle. The federal government has reserved the right to discriminate against foreign nationals by denying them, for example, the right to federal Civil Service employment and to coverage under the federal Medicare program. The states, on the other hand, may not discriminate in this way, with limited exceptions, such as excluding aliens from sensitive state political offices. Last year, in the case of *Plyler* vs. *Doe*, the puzzle took on new intricacy as the Supreme Court for the first time addressed the rights of undocumented aliens under the Constitution's equal-protection clause. By a five-to-four vote, the Court declared unconstitutional a Texas statute which permitted local school boards to exclude school-age undocumented aliens from the public schools. But while the Court decided that the statute in question violated the Fourteenth Amendment, I will argue in this presentation that the ruling did not resolve the Constitutional puzzle.

Writing for the majority, Justice William Brennan faulted the Texas law in two respects. First, he noted, the law directed the onus of a parent's misconduct against his or her children and reflected the unjustified belief that the children of members of a disfavored group do not deserve equal treatment. Second, he found that the total denial of education to these children would burden them with an enduring disability. Because the Texas statute generated these recurring constitutional difficulties, the court applied the technique of intermediate scrutiny and demanded that the law advance some substantial goal of the state in order to be upheld. Rejecting all justification advanced for the statute by the state, the majority held that whatever savings the state might achieve by denying these children an education were wholly insubstantial in light of the cost involved to the children, the state, and the nation.

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In deciding to apply the technique of intermediate scrutiny, Justice Brennan considered the effects of both a total deprivation of education and the state's discrimination on innocent alien children. Therefore, his opinion does not make clear whether either of these factors alone would have been sufficient to trigger heightened review. Moreover, even if the State of Texas had met its burden under intermediate scrutiny, the Court implied that it might nonetheless have subjected the law to strict scrutiny. While Justice Lewis Powell wrote separately to emphasize the Court's conclusion that strict scrutiny would not be appropriately applied to this classification, Justice Harry Blackmun claimed that the Court never reached the question of strict scrutiny, and Justice Brennan's opinion appears to leave open the possibility.

Justice Brennan's carefully-worded opinion never rejects the possibility that some undocumented aliens might be viewed as a suspect class. His dictum concerning illegal aliens may have merely reaffirmed the court's reluctance to afford constitutional protections to aliens who have "entered the country clandestinely and have been here for too brief a period to have become in any real sense a part of our population," as described in the Japanese immigrant case of 1903. The decision thus left open the question of whether discrimination against illegal aliens with a permanent attachment to the nation would trigger strict scrutiny. Similarly, Justice Brennan stated that education is not a fundamental right; but he then suggested that the only consequence of this fact is that it frees the state from having to justify every variation in the manner in which it provides education to its population. In light of these ambiguities, it is impossible to determine whether the equal-protection analysis in the case of *Plyler* vs. *Doe* will have far-reaching implications. The dissenters from the decision claim that it will stand for little beyond the results in these particular cases.

Justice Brennan appeared to regard the equal-protection doctrine as the proper context for resolving the constitutionality of the Texas school law. However, this approach ignored two major doctrines implicated by equal-protection challenges to laws discriminating against aliens, namely, the political question and Congressional preemption. The Court, we should note, expressly reserved judgment on the issue of preemption. If Congress had explicitly authorized discrimination against illegal aliens in state law, then the Court's review of the Texas statute would have violated the political-question doctrine. Furthermore, Congressional authorization of the Texas law would have transformed the Court's ordinary review of a state statute into a potential clash with Congress's plenary power for regulating immigration and naturalization. Although the Supreme Court has never held equal-protection challenges to federal immigration law non-justiciable on the basis of the political-question doctrine, it has on several occasions admitted that the prudential policies underlying that doctrine prevent more than a limited judicial review of such statutes. Under such a toothless standard, virtually any justification for the statute would protect these laws from equal-protection challenges. Federal authorization for the Texas statute would thus have rendered presumptively groundless an equal-protection challenge to the school law.

Conversely, the Court has held that the treatment of aliens is a matter of national moment. Therefore, federal immigration statutes preempt discrimination against aliens, and the supremacy clause renders void any such discriminatory state law, unless Congress has explicitly permitted concurrent state legislation on the subject covered by the challenged law. In the absence of such explicit intent, the Court suggested that even federal *regulation* on the same subject would trigger federal preemption. Hence, either silence or disapproval on the part of Congress would have rendered the Texas law unconstitutional under the supremacy clause.

Although seemingly unrelated to the issue of equal protection, the political-question and preemption doctrines solve the equal-protection enigma raised in *Plyler* vs. *Doe*. The conflict arises between the Court's commitment to a unified equal-protection analysis and its willingness to defer to Congress when statutes burdening aliens come up for judicial review. The Court recognizes that Congressional power in foreign policy matters must often operate outside the constraints of equal protection, so it must seek a solution in a doctrinal framework which maximizes the values of equal protection without implicating itself in Congress's sometimes questionable decisions. The political-question doctrine aims at such a solution by allowing the Court to accommodate political decisions without endorsing them and to avoid taking a position on equal protection which Congress might override in foreign policy matters. The political-question solution forces Congress to assume sole responsibility for overriding the norm of equality, and the Court has held that the law requires a clear statement to that effect.

The affirmative evidence preemption standard also achieves the Court's equal-protection goals by erecting federal obstacles to discrimination against aliens in state law. The Court's decisions which use the preemption doctrine to strike down state statutes which discriminate against legal aliens explicitly mention no equal-protection principles, but statutory language does not support the conclusion that Congress empowered the states to impose any further burdens on such aliens. Rather, the Court has presumed that law-abiding aliens should not be singled out. Furthermore, the affirmative evidence standard transforms Congressional silence into an effective ouster of discriminatory state law. The preemption doctrine, like political-question treatment, can safeguard the Court's role in enforcing equal protection by forcing Congress to take responsibility for foreign-policy decisions that lie beyond the Court's reach.

In *Plyler* vs. *Doe*, Justice Brennan acknowledged that pursuit of Congressionally authorized objectives would outweigh the equal-protection interests that give rise to intermediate scrutiny. But he concluded that the Texas statute neither corresponds to any identifiable Congressional policy nor operates harmoniously within the federal program. Finding no clear statement of Congressional intent, the majority for which he wrote refused to ascribe to Congress a decision to override what they saw as the children's weighty equal-protection interests. In effect, Justice Brennan answered the question of Congressional intent raised by the political-question and preemption doctrines, but his framework for addressing this issue raises several problems.

First, to address Congressional intent well after the equal-protection inquiry is underway may force the Court to address the merits of a claim which it is incompetent to hear. Although in the Plyler case an ambiguous legislative record forced Justice Brennan to divine Congressional intent by deciding the level of equal-protection scrutiny, federal law will not always be unclear. When it is clear and in the states' favor, the decision on the appropriate level of equal-protection scrutiny will be wholly advisory.

Second, Justice Brennan's analysis points out the dangers inherent in the Court's attempt to reconcile the policies underlying the political-question doctrine with its commitment to judicial review. Under the Court's quasi-political-question ruling in the Plyler case, federal authorization of state legislation in the area would not lead to political-question abstention; it would imply only deferential review of discriminatory state law. While the decision to adopt deferential review is motivated by prudential concerns, it is easily confused with the judgment that normally accompanies deferential review in equal-protection cases: that the plaintiff has no cognizable equal-protection interests. The move to deferential review, motivated by prudential concerns, puts the Court in the troublesome position of appearing to claim that stigmatic interests suddenly disappear when Congress, not the state, does the discriminating.

Finally, having concluded that Congress did not authorize Texas to deny the Plyler children access to public school and therefore finding no basis for deference, Justice Brennan also found a lack of affirmative evidence for authorizing the state to legislate in the area. Yet, since the Court did not rule the Texas law preempted, its disposition of the case on equal-protection grounds seems compelled. Buried within Justice Brennan's equal-protection analysis are hints that, to avoid preemption, the Texas statute need not have been backed by affirmative evidence of Congressional authority. Even when no national policy supports the state, he concluded, deterring unlawful immigration which impinges upon traditional state concerns is a proper state objective. This retreat from the affirmative evidence standard suggested the abandonment of one of the Court's most powerful tools for enforcing equal-protection values in the realm of foreign affairs. However, less than two weeks after it decided the Plyler case, the Court reaffirmed the affirmative evidence standard as it applies to state laws which burden lawfully resident aliens.

The ultimate difficulty with the Plyler case is not that the Court's substantive value judgments do not realize the underlying purpose of equal protection; rather, the opinion fails to appreciate the role of the seemingly neutral judicial doctrines of political-question abstention and preemption. There can be no question that the Court is the final arbiter of the Constitution; but when it takes on the difficult task of enforcing the Constitution in an area fraught with the exigencies of foreign policy, it may be well advised to employ its passive mechanisms for achieving equality.

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William Wayne Justice is Chief Judge of the U.S. District Court for the Eastern District of Texas, in Tyler, Texas. He is the author of the original decision, upheld by the U.S. Supreme Court in 1982, which struck down a Texas state law denying tuition-free public education to children of undocumented immigrants. He was named Trial Judge of the Year for 1982 by the Association of Trial Lawyers of America.

Charles B. Keely is a demographer specializing in immigration to the United States. He serves as Deputy Director of the Center for Policy Studies at The Population Council in New York City and is the author of two of the Population Council's publications: *U.S. Immigration: A Policy Analysis* (1979) and *Global Refugee Policy: The Case for a Development Approach* (1982). Dr. Keely presented the First Annual DeWitt A. Higgs Lecture at University of California, San Diego as part of the Earl Warren Memorial Symposium on "America's New Immigration Law."

Arnold Leibowitz is Special Counsel to Senator Alan K. Simpson, chairman of the U.S. Senate's Subcommittee on Immigration and Refugee Policy and principal architect of the Immigration Reform and Control Act of 1983. Mr. Leibowitz also participated in the drafting of proposed legislation for the U.S. Select Commission on Immigration and Refugee Policy.

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Cruz Reynoso is Associate Justice of the Supreme Court of California. He served from 1979 to 1981 as a Presidentially appointed member of the U.S. Select Commission on Immigration and Refugee Policy. He has held many other public offices, including that of Director of the California Rural Legal Assistance agency, and has also taught law.

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Carl E. Schwarz is Professor of Political Science and Public Law at Fullerton College, California, and is a Faculty Research Associate of the Center for U.S.-Mexican Studies at the University of California, San Diego. He is a specialist on comparative law and on the legal rights of undocumented and permanent-resident aliens in the United States.

Barbara K. Strickland has been a practicing immigration attorney in southern California. She has also served as a consultant to the Mexican government on U.S. immigration law and policy and has authored an analysis of U.S. laws bearing upon undocumented immigrants, published by the Mexican Ministry of Labor. She is currently a legal-affairs consultant based in Mexico City.

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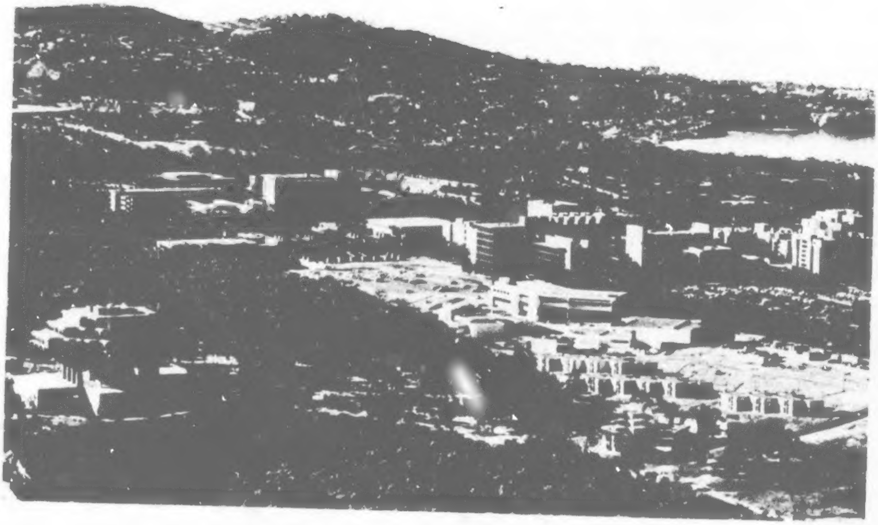
Aristide R. Zolberg is Professor of Political Science at the University of Chicago. He is the author of a major forthcoming book on the politics of immigration in advanced industrial societies, and he has also published extensively on problems of political development in developing nations.



The Center for United States–Mexican Studies at the University of California, San Diego

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